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CHARLES ELMORE C

Supreme Court of the United States

October Term, 1935.

ELINOR DORRANCE HILL,
Appellant,
vs.
J. H. THAYER MARTIN, State Tax Commissioner of State of New Jersey; WILLIAM D. KELLY, State Supervisor, Inheritance Tax Bureau of State of New Jersey; FRANK J. MURRAY, Comptroller of State of New Jersey; WILLIAM H. ALBRIGHT, State Treasurer of State of New Jersey, and DAVID T. WILENTZ, Attorney General of State of New Jersey,
Appellees.

No. 193.

ETHEL M. DORRANCE, GEORGE MORRIS DORRANCE, M. D., ARTHUR C. DORRANCE and CAMDEN SAFE DEPOSIT AND TRUST COMPANY, Executors of the Last Will and Testament of JOHN T. DORRANCE, deceased,
Plaintiffs,
vs.
Same,
Defendants.

No. 194.

Appeals from the District Court of the United States
For the District of New Jersey.

BRIEF IN BEHALF OF APPELLEES.

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Supreme Court of the United States

October Term, 1935.

ELINOR DORRANCE HILL, *Appellant,* vs. J. H. THAYER MARTIN, State Tax Commissioner of State of New Jersey, WILLIAM D. KELLY, State Supervisor, Inheritance Tax Bureau of State of New Jersey, FRANK J. MURRAY, Comptroller of State of New Jersey, WILLIAM H. ALBRIGHT, State Treasurer of State of New Jersey and DAVID T. WILENTZ, Attorney General of State of New Jersey, *Appellees.*	No. 193.
ETHEL M. DORRANCE, GEORGE MORRIS DORRANCE, M. D., ARTHUR C. DORRANCE and CAMDEN SAFE DEPOSIT AND TRUST COMPANY, Executors of the Last Will and Testament of JOHN T. DORRANCE, deceased, *Plaintiffs,* vs. Same, *Defendants.*	No. 194.

Appeals from the District Court of the United States For the District of New Jersey.

BRIEF IN BEHALF OF APPELLEES.

Opinion of the District Court.

The opinion of the District Court has not yet been officially reported; it appears in the record at pp. 221-230.

Jurisdiction.

The jurisdiction of this court is asserted under section 266 of the Judicial Code (U. S. Code, Sec. 380). Both cases come to this court by direct appeal from decrees of the District Court entered June 4, 1935, denying "for want of jurisdiction" the prayer of the bills for interlocutory injunction.

The appellants duly filed a statement as to the jurisdiction of this court; the appellees filed a statement opposing jurisdiction, and moving that the appeals be dismissed and the causes remanded to the District Court, with instructions to dismiss the bills.

On October 14, 1935, probable jurisdiction was noted; and further consideration of the motions to dismiss was postponed to the hearing on the merits.

Statement of the Case.

The bills of complaint were filed on April 1, 1935 (amended bills on April 10, 1935), alleging the threatened violation by defendants of certain rights of the plaintiffs under the Federal Constitution, and praying for an injunction "temporary until hearing and perpetual thereafter," enjoining the defendants and their agents, etc., "acting under and by virtue of their authority," from collecting or attempting to collect inheritance tax from plaintiffs on the transfer of intangible personal property, from refusing to issue tax waivers, and from refusing to release from escrow the personal property now held in escrow, subject to the control of the defendants, or any of them (*R. 17 and 506, 7*).

Rules to show cause why an interlocutory injunction should not issue were allowed, and the motion for such injunction was argued before a court convened under section 266 (*U. S. Code 380*).

From the pleadings and affidavits the following facts appear without dispute:

The tax, the collection of which plaintiffs prayed the court to restrain, had been ascertained, after appraisal of the property of the estate, by the defendant, Martin, as State Tax Commissioner of the State of New Jersey;

On an appeal by the executors to the Prerogative Court of the State of New Jersey (taken pursuant to the statute by authority of which the tax was assessed), the determination of the Commissioner was affirmed (with certain modifications, not now material).

The executors thereupon reviewed the judgment of the Prerogative Court in the New Jersey Supreme Court by writ of certiorari issued by that court on application of the executors.

The New Jersey Supreme Court affirmed the judgment of the Prerogative Court (*R. 155, 6*), and no appeal has been taken from the judgment of the New Jersey Supreme Court.

The plaintiffs claimed and the defendants denied that said judgment of the Supreme Court was part of the administrative procedure for the review of the assessment, and was not a judicial determination or the judgment of a "court."

The District Court, after referring to these facts, said:

> "We are firmly of opinion that the jurisdiction of the Supreme Court of New Jersey in reviewing the action of statutory agencies created for the purpose of assessing and collecting taxes is judicial * * *, made so by the Constitution of New Jersey, and that the Court is of sufficiently high rank to be recognized and on occasion followed by court of the United States * * *; that the administrative proceedings in respect to the tax ended at the latest with the judgment of the Prerogative Court and that in consequence the executors on turning to

the federal district court after the judicial decision by the Supreme Court of New Jersey not only encountered a plea of res judicata but were confronted by Section 265 of the Judicial Code which, going directly to the jurisdiction of this Court to grant the relief asked for, provides that: 'A writ of injunction shall not be granted by any court of the United States to stay proceedings in any court of a state, except * * *'" (*R. 227, 8*).

The District Court accordingly concluded that it was without jurisdiction and decrees were entered denying the prayer for interlocutory injunction (*R. 230, 231*).

Plaintiffs appealed to this court, obtaining a stay, pending the determination of said appeals. The assignments of error are the same in both cases; they are, in substance, that the District Court erred in denying the interlocutory injunction (*R. 232*).

SUMMARY OF ARGUMENT.

I.

The proceedings in the Supreme Court of New Jersey in reviewing by certiorari the final decree of the Prerogative Court, were judicial.

(*a*)

History of the New Jersey Assessment.

(*b*)

Statutory Proceedings for Review of Assessment.

(*c*)

Jurisdiction of New Jersey Supreme Court to Review Tax Assessments.

(*d*)

An Injunction, if Granted as Prayed, Would Violate Section 265 of the Federal Judicial Code.

(e)

The Suits are In Fact Against the State of New Jersey.

II.

The judgment of the Supreme Court of the State of New Jersey is res judicata.

III.

Section 266 of the Judicial Code does not apply to this case.

IV.

Appellants have not shown any irreparable injury or other grounds of equity jurisdiction.

V.

The judgment of the Supreme Court of the State of New Jersey does not violate the full faith and credit clause.

VI.

Appellants are in laches.

VII.

The evidence shows that the domicil of the decedent at the time of his death was in the State of New Jersey.

VIII.

Appellants are estopped from claiming that the domicil of the decedent was in Pennsylvania.

IX.

Interlocutory injunction should not be issued if the questions either of fact or of law are doubtful.

ARGUMENT.

I.

The proceedings in the Supreme Court of New Jersey in reviewing by certiorari the final decree of the Prerogative Court, were judicial.

(*a*)

History of the New Jersey Assessment.

At the time of the death of the testator, John T. Dorrance, on September 21, 1930, the statute of New Jersey imposed inheritance taxes of the value of $500 or over, when the transfer is by will or by intestate laws of the State, from any person dying seized or possessed thereof, "while a resident of the State" (*inter alia*) upon the transfer of any property (*N. J. P. L. 1929, pp. 250-6*); the statutes declared the taxes to be due and payable on the date of death, with interest at 10% after one year from that date, until paid; and such taxes became a lien on all property of decedent (*N. J. P. L. 1922, pp. 297, 8*).

Administrators, executors or trustees having in charge any trust, legacy or property for distribution, subject to such tax are required to deduct and pay the tax therefrom, and are forbidden to deliver any specific legacy or property subject to tax to any person until he shall have collected the tax thereon (*N. J. P. L. 1909, p. 330*). They are forbidden to turn over or transfer any property of an estate until the tax due thereon, and interest, has been paid, on pain of being personally liable for such tax and interest in an action of debt in the name of the State (*N. J. P. L. 1918, pp. 1074, 1077*).

Prior to July 1, 1931, the Comptroller of the Treasury of the State of New Jersey was the officer who administered the inheritance tax laws; by Chapter 303, N. J. Laws of 1931, p. 749, these duties were transferred

to the defendant, Martin, as Tax Commissioner—an office created by Chapter 336, N. J. Laws of 1931 (pp. 823-5); said defendant is the duly appointed and acting State Tax Commissioner and is charged with the power and the duty to assess and collect inheritance taxes.

The testator died on September 21, 1930 at his residence known as "Pomona Farms," in the Township of Cinnaminson, Burlington County, New Jersey (*R. 17, 20*). His last will and testament, declaring himself to be of the Township of Cinnaminson, in the County of Burlington and State of New Jersey (*R. 113, 126, 127*), was offered for probate on October 1, 1930, before the Surrogate of Burlington County on the sworn petition of the executors (*R. 113, 129, 130*). On the following day (October 2, 1930) an order for probate was entered by the Surrogate of Burlington County, New Jersey, and letters testamentary on that will were issued by him to said executors (*R. 131, 2*). Thereupon they executed their undertaking to comply with the provisions of federal and state tax laws and to truly perform their duties as executors (*R. 131*); and on April 17, 1931 (*R. 55*) they filed their inventory and appraisement in the office of the Surrogate of Burlington County, showing the gross value of the estate as $114,850,733.39 (*R. 135*).

The executors have administered the estate under the jurisdiction of the Orphans' Court of Burlington County from the date of the probate of the will to the present time and have received allowances, on two accountings, of commissions thereon of $1,500,000 and counsel fees of $250,000 (*R. 143, 152*), which, with additional commissions, was increased by $533,784.81 by the decree of the Prerogative Court (*R. 100*).

No application for probate of decedent's will has ever been made in any state other than New Jersey; and from the date of the admission of said will to probate by the

Surrogate of Burlington County, New Jersey, decedent's estate has been administered solely according to the provisions of that will and under authority of and pursuant to the orders of the Surrogate Court of Burlington County, the Orphans' Court of that county, and the Prerogative Court of the State of New Jersey (*R. 113*).

On April 6, 1931, pursuant to and in accordance with the statutes of the State of New Jersey and the Regulations of the Tax Department of that state, the executors filed a Return with the Inheritance Tax Bureau (and on August 17, 1931 an amended Return), stating, under oath, that the decedent was late of Burlington County, New Jersey, that his estate consisted of bank deposits, securities and miscellaneous items amounting to the sum named in the Returns from which certain deductions were claimed, and that the bonds, stock certificates, and other evidence of title to the personal property were then and still are located in the State of New Jersey (*R. 56, 117*).

In support of the Returns so filed in New Jersey Hon. William D. Lippincott, Proctor for Executors, who for many years had been personal counsel of the decedent and of the Campbell Soup Company (*R. 315*), and who had, himself, served a term as judge of the Court of Common Pleas of Burlington County (*R. 314*)—which, *ipso facto*, also made him the Judge of the Orphans' Court of that county—and who drew the will in question (*R. 319-321*), submitted, on May 2, 1931, to the Comptroller of the State of New Jersey (he then being the officer who administered the inheritance tax), a document entitled "Statement of Facts as to the Domicile of Dr. John T. Dorrance in New Jersey" with a letter to the State Supervisor of the Inheritance Tax Bureau wherein he stated that he had received from the Register of Wills of Delaware County, Pennsylvania, a notice and appraisement (copy enclosed) claiming that the decedent was a resident of Radnor Township, Pennsylvania, and that taxes were due

that state amounting to the sum of $31,465,200.00, based upon a valuation of $199,999,000.00, which Judge Lippincott said "was fictitious and without foundation save newspaper reports"; he expressed his opinion that "there is no doubt whatever that if the question of decedent's domicile were to be decided in the New Jersey courts, decedent's domicile must be found to be in Cinnaminson Township, Burlington County, New Jersey" (*R. 463-7; 477-489*).

On May 13, 1931, the Comptroller, in a letter to Judge Lippincott, referred to the proof of domicil submitted with his letter of May 2, 1931, and announced the following decision on that question:

> "After a very careful consideration of all available data, including the oral statement submitted by you during your recent appearance, the Department has concluded that the legal domicile of the decedent at the date of his death and for many years prior thereto was Cinnaminson, Burlington County, New Jersey. The completion of the transfer inheritance tax proceeding is being held in abeyance pending the receipt of the additional information called for by letter addressed to the Camden Safe Deposit & Trust Co., under date of April 27, 1931" (*R. 467*).

The additional information referred to by the Comptroller was supplied by the Camden Safe Deposit & Trust Company, one of the executors, in an amended and corrected Return, transmitted on August 17, 1931, to defendant, Martin (who had then succeeded the Comptroller in charge of transfer inheritance taxes (*R. 468*)). That return is sworn to by Mr. Norcross, Vice-President of that corporate executor; like the return of April 6, 1931, it is entitled "In the matter of Estate of John T. Dorrance, late of Burlington County" (*R. 468*). It shows that his estate, the market value of which was therein estimated at $115,121,518.92 consisted of personal property, and almost

entirely of intangible property (*R. 469*). Endorsed on that Return is a report of the District Supervisor and Appraiser in which he sets up the value of the personal property as stated in that Return and, after deducting debts and expenses, that report shows the net amount of the estate for distribution as $112,055,400.86 (*R. 469*).

On October 17, 1931, the New Jersey State Tax Commissioner assessed inheritance taxes on direct transfers in the sum of $12,247,333.52, and a proposed compromise tax on contingent remainders and trust estates of $4,521,143.90 (*Par. 39 of Bill, R. 10; Par. 39 of Answer, R. 43; 469*).

On November 16, 1931, notice of the assessment was served by mail upon one of the executors, and Judge Lippincott was advised to the same effect on the same date (*R. 469, 470*); the proposed compromise assessment was vacated by the Prerogative Court, without prejudice, in respect to assessment of taxes which might be made when the contingencies named in the will would eventuate or compromise same in accordance with the statute (*R. 99, 100*); and is not now in question.

On December 4, 1931, the Commissioner received a petition of the executors verified by Judge Lippincott, reciting among other things, that subsequent to the making the assessments of August 17, 1931, the executors had obtained a large amount of information, facts and evidence relating to and bearing upon the domicil of the decedent which was not in their possession at the time those assessments were made, and that the executors were desirous of submitting such additional information, facts and evidence to the respondent before the final determination of those assessments, which they deemed necessary to be considered by respondent before final action. They prayed that the assessments of October 17, 1931, be opened, set aside and cancelled, and that the proceedings

before respondent be opened and permission be granted to submit such further and additional facts and evidence (*R. 470-3*).

Up to that time the only information, facts or evidence submitted by the executors to the defendant, Martin, or his predecessor had consisted of proof of decedent's domicil in New Jersey. Their petition to set aside the assessments and open the proceedings gave no indication of any change of attitude. It did recite that the Commonwealth of Pennsylvania claimed that decedent was domiciled therein and had appraised his estate for inheritance taxes under Pennsylvania laws, and that the appeal from that appraisement had been heard by the Orphans' Court of Delaware County, Pa., after the filing of those assessments, and that a large amount of testimony relating to and bearing upon decedent's domicil was presented before the Orphans' Court of Delaware County, Pennsylvania, upon that hearing, but there was no indication that that testimony was different, or would produce a different result, than the testimony submitted before the New Jersey Tax Department or any claim by the executors that decedent was not domiciled in New Jersey (*R. 470-3*).

The reference to the claim of Pennsylvania was not new, since it was stated and discussed in Judge Lippincott's letter of May 2, 1931 when he submitted proof to the Comptroller (*R. 463*).

Pursuant to the prayer of said petition, the Tax Commissioner on December 12, 1931, set aside and cancelled the assessments of October 17, 1931, and opened the proceedings thereon, and gave to the executors permission to submit further and additional information, facts and evidence, relating to and bearing upon the domicil of decedent, and so advised Judge Lippincott by letter of the same date (*R. 473*) which was acknowledged on December 14, 1931, by a letter in which Judge Lippincott stated that

the additional evidence to be submitted would consist of the evidence presented before the Orphans' Court of Delaware County, Pa., on the appeal from the Pennsylvania appraisement, and that when the argument of that case was completed he would submit further and additional information, facts and evidence relating to this estate (*R. 473, 4*).

On March 7, 1932, the opinion and decree of February 15, 1932, of the Orphans' Court of Delaware County, Pa., setting aside the Pennsylvania appraisement and decreeing that decedent was domiciled in New Jersey at the time of his death, was submitted to defendant, Martin, together with a copy of the testimony and exhibits in that case (*R. 474*). At some later date, not disclosed by the record, the executors also submitted to the Tax Commissioner the opinion (and dissenting opinions) of the Pennsylvania Supreme Court reversing the decree of the Orphans' Court of Delaware County, Pa., and holding that decedent was domiciled in Pennsylvania (*R. 474*).

On October 10, 1932, transfer inheritance taxes on the estate of decedent were reassessed in the same manner and in the same amounts as on October 17, 1931 (*R. 475*); and on the same date notices of those assessments were served upon Judge Lippincott by mail (*R. 475*); that service was acknowledged by a letter of October 12, 1932, in which he referred to the decision of the Supreme Court of Pennsylvania on September 24, 1932, holding decedent was domiciled in that state, and announced his intention to appeal from the New Jersey assessments (*R. 476*).

Pursuant to the statute, the executors served notice of appeal to the Ordinary, which was afterwards, on March 14, 1933, amended (*R. 65-73*); defendant, Martin, as State Tax Commissioner, duly filed an answer thereto on March 28, 1933 (*R. 73-81*); and the matter came on to be heard before the Prerogative Court in accordance with the New Jersey statute.

On May 11, 1934, the final decree of the Prerogative Court was filed, sustaining the assessment, except as to the assessment on contingent remainders which was vacated, without prejudice (*R. 98-100*). See *In Re Estate of John T. Dorrance, Deceased*, 115 N. J. Eq. 268, and 116 N. J. Eq. 204.

The executors thereupon obtained a writ of certiorari from the New Jersey Supreme Court to review the decree of the Prerogative Court; and in support of that writ, filed Reasons which raised all the questions (and several more) now sought to be raised by the bills of complaint (*R. 100-106*).

On February 8, 1935, the New Jersey Supreme Court filed its decision on which the judgment of that court was duly entered, dismissing the writ of certiorari and affirming the assessment as corrected by the decree of the Prerogative Court (*R. 155-7*). See *Dorrance* v. *Martin*, 13 N. J. Misc. Rep. 168.

(*b*)

Statutory Proceedings for Review of Assessment.

Under the New Jersey statute the State Tax Commissioner appoints an appraiser, who notifies the parties interested of the time and place of the appraisement of the property of decedent; it is made the duty of the appraiser to appraise the property "at its fair market value" and for that purpose he may issue subpoenas, compel the attendance of witnesses and take evidence of witnesses; the appraiser then reports the value to the State Tax Commissioner, together with such other facts as the commissioner may require; from said report the commissioner "shall forthwith assess and fix the cash value of such estate and levy the tax to which the same is liable, and shall immediately give notice thereof, by

mail, to all parties known by said State Tax Commissioner to be interested therein" (*N. J. P. L. 1931, p. 763*).

The statute then provides:

> "Any person or corporation dissatisfied with said appraisement or assessment may appeal therefrom to the Ordinary of this State within sixty days after the making and filing of such assessment, on giving a bond, approved by the Ordinary of this State, conditioned to pay said tax so as aforesaid levied by the said State Tax Commissioner, together with interests and costs, if the said tax be affirmed by the Ordinary" (*Sec. 18*) (*N. J. P. L. 1931, p. 764*).

The statute gives the Ordinary jurisdiction "to hear and determine all questions in relation to any tax levied under the provisions of this act". (*Sec. 20, N. J. P. L. 1909, p. 335*).

The statute then provides for the enforcement of the collection of unpaid taxes, as follows:

> "If it shall appear to the State Tax Commissioner that any tax which has accrued under this act has not been paid according to law said Commissioner *shall* report such fact, in writing, to the register of the Prerogative Court, and said register shall issue a citation citing the persons or corporations interested in the property liable to said tax to appear before the Ordinary on a certain day, not more than three months from the date of such citation, and show cause why such tax should not be paid; the service of such citation and the subsequent proceedings had thereon shall conform to the practice prevailing in the Prerogative Court. Upon the making of any decree the register of the Prerogative Court shall, upon the request of the State Tax Commissioner, furnish one or more copies of said decree, and the same shall be docketed and filed by the clerk of the Supreme Court, or by the county clerk of any county in this State, upon the request of the State Tax Commissioner, and the same shall have the same effect as a lien

by judgment, and execution shall issue thereon according to the rules and practice appertaining to other judgments docketed and filed with said respective clerks" (*Sec. 21*) (*N. J. P. L. 1931, p. 764*).

"Whenever the State Tax Commissioner shall have reason to believe that any tax is due and unpaid under this act, after the neglect and refusal of the persons or corporations interested in the property and liable to said tax to pay the same, he shall notify the Attorney-General of this State, in writing, of such failure to pay such tax, and the said Attorney-General, when so notified, if he have probable cause to believe that a tax is due and unpaid, shall prosecute the proceeding before the Ordinary of this State, as provided for in section twenty-one of this act, and the State Treasurer shall, on the warrant of the Comptroller and the certification of the State Tax Commissioner pay all the expenses of said proceeding" (Sec. 22) (*N. J. P. L. 1931, p. 765*).

The references in the statute to the "Ordinary" mean the Prerogative Court of the State of New Jersey. *Bugbee* v. *Van Cleve*, 99 N. J. Eq. 825.

The decree of the Prerogative Court cannot be reviewed by appeal to the Court of Errors and Appeals of New Jersey, but only in the New Jersey Supreme Court by writ of certiorari. *Roebling's Estate*, 91 N. J. Eq. 72, 75.

But as the Court of Errors and Appeals is the highest court of that state, either party may take an appeal as of right from the judgment of the New Jersey Supreme Court on certiorari.

The time limit for such appeal is one year (*2 Comp. Stats. of N. J. of 1910, p. 2208, sec. 2; 2 Cum. Supp. of 1924, p. 2818, secs. 163-301; Chapter 62, p. 109, N. J. Laws of 1916*).

(c)

Jurisdiction of New Jersey Supreme Court to Review Tax Assessments.

It is well settled that the New Jersey Supreme Court has exclusive jurisdiction of allowance of prerogative writs, including the writ of certiorari.

It will be noted that there is no express provision in the New Jersey Inheritance Tax for a review by the New Jersey Supreme Court on certiorari, or otherwise, either of an assessment, or of a decree of the Ordinary relating to such assessment.

The power of the New Jersey Supreme Court to review a decree of the Ordinary depends upon the inherent power of that court to review proceedings of statutory tribunals.

The jurisdiction of that court to review the proceedings of such a tribunal, is a matter of established judicial history in the State of New Jersey.

Such jurisdiction is not a matter of statute but was inherited from the Court of King's Bench; the New Jersey Constitution perpetuates in the Supreme Court of the State the exclusive power of the Court of King's Bench relative to Prerogative writs, such as certiorari, mandamus, etc. The discussion of the power of the New Jersey Supreme Court began with the case of *State* vs. *Justices, etc. of Middlesex County,* 1 N. J. L. 284 (244).

Further discussion of the power and of the history of that court will be found in the following: *Ludlow* v. *Ludlow Executors,* 4 N. J. L. 444 (387); *Chandler* v. *Monmouth Bank,* 9 N. J. L. 127; *Carron* v. *Martin,* 26 N. J. L. 594, 600; *Dufford* v. *Decue,* 31 N. J. L. 302; *Flanagan* v. *Plainfield,* 44 N. J. L. 118; *Conger* v. *Convery,* 52 N. J. L. 417, 429 (53 N. J. L. 658); *Roesel* v. *State,* 62 N. J. L. 216; *Flanigan* v. *Gugenheim Smelting Co.,* 63 N. J. L. 647.

In the original bills it was alleged that the proceeding before the Prerogative Court was part of the "administrative" procedure, and that when the assessment had been sustained by that court the administrative procedure under the statute "was at an end" (*pars. 37 and 44*).

In the amended bills the somewhat inconsistent statement is added that the New Jersey Supreme Court is authorized, on certiorari, to review the facts as well as the law, to take additional testimony, and to affirm, reverse or modify the assessment, "thus rendering the action of that court administrative and not judicial"—but the allegation that when the assessment had been sustained by the Prerogative Court, the administrative procedure "was at an end" remains in the amended bills precisely as alleged in the original bills (*R. 11-12*).

We deny that the administrative procedure was at an end when the assessment had been sustained by the Prerogative Court, and say that the administrative procedure was at an end at the time the assessment had been finally fixed by the State Tax Commissioner.

But however that may be, we disagree with the allegation in the amended bills that the "action" of the New Jersey Supreme Court was administrative.

It is true that the New Jersey Supreme Court has power under section 11 of the Certiorari Act to "reverse or affirm, in whole or in part," a tax or assessment under review by certiorari (*1 Comp. Stats. of 1910, p. 406*). But that statute is merely declaratory of the inherent power of the Supreme Court as successor to the Court of King's Bench. The rule on the subject is summarized by his Honor, Judge Black (one of the former Justices of the New Jersey Supreme Court) in his authoritative work

entitled "Law of Taxation." We quote from the fourth edition (1935), section 279a, as follows:

> "It always has been one of the prerogatives of the Supreme Court, to supervise the proceedings and to correct the errors of all inferior tribunals, and of persons and bodies exercising particular legal functions, such, as, the assessment of property for taxation. The principal mode in which this power is put forth, is by the effective and comprehensive writ of *certiorari*.
>
> Such power cannot be transferred by legislation to the Court of Chancery, to review the action of taxing authorities and thereby destroy the right of review resting in the Supreme Court. The Supreme Court has exclusive jurisdiction" (p. 394).

With particular reference to the method of review of assessments under the Inheritance Tax Law, Judge Black summarizes the New Jersey decisions, as follows:

> "The legislature can not by the exercise of its power to create statutory agencies, as tribunals, to review the action of taxing authorities, destroy the right of review resting in the Supreme Court, in matters of taxation, by designating, as such agency, a court of superior jurisdiction, whose judgments or decrees rendered in the performance of its *ordinary judicial functions* are reviewable, only, by appeal to the Court of Errors and Appeals (italics ours).
>
> An appeal to the Court of Errors and Appeals will not lie from a decree of the Ordinary, setting aside *pro tanto* an assessment of a transfer tax, such decree being reviewable only in the Supreme Court, by *certiorari*, and then, an appeal may be taken from the judgment of the Supreme Court to the Court of Errors and Appeals.
>
> On an appeal from the comptroller's appraisement and assessment, his findings of fact will be set aside only, if the evidence be insufficient to sustain them or for other legal cause" (*Black's Law of Taxation, 4th ed., sec. 129h, p. 181*).

In *Jersey City* v. *Lembeck*, 31 N. J. E. 255, Beasley, *C. J.*, after referring to the constitutional provisions relating to the powers of the Court of Chancery and of the Supreme Court of the State of New Jersey, said:

> "Neither will it be gainsaid that it is, and always has been, one of the prerogatives of the supreme court of this state to supervise the proceedings and to correct the errors of all inferior tribunals, and of persons and bodies exercising particular legal functions; the practice is so fixed and the adjudications so clear upon the point, that it would be a mere waste of time to do more than state it as an *admission*. And the principal mode in which this power is put forth, is by the effective and comprehensive writ of *certiorari*. In the case under review, the officers, whose acts have been set aside, were employed in a matter which was, from first to last, of a purely legal nature. From the time of the first introduction of magistracy into this state, all through colonial and provincial times, up to within a very recent period, such a procedure as this has been carried on under the superintendency of the supreme court of this state, and if a person, in the situation of this complainant, had, at any time in all these years, conceived himself to have been wronged in point of law, by the doings of such officers, he would have applied to that court, which, in its discretion, would have commanded such doings to be certified to it, so that what was right in law, might be done. Such was the ancient and such has been the modern method of executing the law in such an affair, and there is, perhaps, no single attribute of the supreme court that is, and ever has been more peculiarly its own than this great power of supervision and regulation, and, to a certainty, if it can be shorn of this prerogative, then none of its prerogatives are secure. From these considerations, I am led to the conviction that, if this act is to bear the interpretation which must be put upon it in order to uphold this suit, then it should, on constitutional grounds, be declared by this court to be utterly nugatory" (p. 266).

In the case of *Roebling's Estate*, 91 N. J. Eq. 72, the question before the Court of Errors and Appeals was whether an appeal from the decree of the Prerogative Court authorizing such appeal from an assessment of transfer inheritance tax, could be taken direct to the Court of Errors and Appeals, or whether it should first be reviewed by the New Jersey Supreme Court; Gummere, *C. J.*, said:

> "The case before us involving, as it does, a matter of taxation, is reviewable by *certiorari* only, notwithstanding the fact that the legislative agency created for the purpose of a primary review of the action of the tax assessor is a *court of record* whose orders and decrees ordinarily are reviewable only by an appeal to this court" (p. 75) (*italics ours*).

In *Ettrick* v. *State Board of Tax Appeals*, 12 N. J. Misc. 432, Brogan, *C. J.* held that the action of the Board in refusing to accept petitions of appeal because they were alleged to be filed after the expiration of the statutory date therefor, was held reviewable by certiorari.

Thus, all the higher courts of New Jersey in opinions delivered by the Chief Justices of the Supreme Court during their respective terms of office, agree that under the Constitution of New Jersey the Supreme Court has exclusive jurisdiction of review of tax assessments (whether under inheritance tax or otherwise), and that such review does not depend upon the provisions of any statute but upon the constitutional power of that court.

While the court has the power to revise an assessment or tax it may, in its discretion, refuse to exercise that power, and remand the case to the assessing tribunal to correct the assessment. So held in *Town of Kearny* v. *State Board of Taxes and Assessment*, 103 N. J. L. 26, holding that the power of the court to fix the amount of an assessment was not "mandatory or obligatory"; thus showing that the court's power is not administrative.

(*d*)

An injunction, if granted as prayed, would violate section 265 of the Federal Judicial Code.

Section 265 provides:

> "The writ of injunction shall not be granted by any court of the United States to stay proceedings in any court of a State, except in cases where such injunction may be authorized by any law relating to proceedings in bankruptcy."

The question therefore arises whether the injunction which the plaintiffs seek, if granted, would stay proceedings "in any court of" the State of New Jersey.

It will be observed that the prohibition of Section 265 has three conditions:

1. The injunction must be in the form of a *stay.*
2. It must be against "proceedings."
3. The proceedings must be "in any court of a State."

The bills show that the plaintiffs took an appeal to the Ordinary pursuant to the foregoing provisions of the statute and that a decree of that court was entered on May 11, 1934, sustaining the assessment (*pars. 35 and 42 of bills*).

The bills further show that the executors obtained a review of that decree by writ of certiorari from the New Jersey Supreme Court, and that that court sustained the decree of the Prerogative Court, by its judgment of February 11, 1935 (*pars. 36 and 43 of bills*).

Each bill prays, among other things, that the defendants be enjoined "from in any way collecting or attempting to collect" the tax in question.

There can be no doubt that the first condition of the application of Section 265 appears on the face of the bills.

The second condition is that the injunction must be against "proceedings."

"Generally speaking, the term 'proceeding' means a prescribed course of action for enforcing a legal right, and hence it necessarily embraces the requisite steps by which judicial action is involved. It is a very comprehensive term." *Hyattsville Building Ass'n.* v. *Bolic,* 44 App. D. C. 408.

Thus it has been held that levy and sale under execution issued by a judgment in a state court is a proceeding within the meaning of the section. *Ruggles* v. *Simonton,* 20 Fed. Cas. No. 12,120; *American Ass'n.* v. *Hurst,* 59 Fed. 1; *Leathe* v. *Thomas,* 97 Fed. 136.

At pages 18, 22, 26, 27, 29 and 48 of the appellants' brief, it is argued that there is now no proceeding pending in any court of New Jersey for the collection of the tax, and that the tax cannot be collected without the institution of a "new and independent action" (*p. 48*).

After the judgment of the State Supreme Court, the case was remanded to the Prerogative Court for further proceedings on its final decree.

The taxes remaining unpaid, Section 21 of the act imposed the duty upon the State Tax Commissioner (the statute says he *shall*) to report the fact to the register of the Prerogative Court, whereupon it is his duty (the statute says he *shall*) to issue a citation to the persons interested to appear before the court to show cause why the tax should not be paid. Section 22 directs the Attorney General to (the statute says he *shall*) prosecute the "proceeding" before the court.

These are the only state officers (and the only duties) prescribed or required by law in such circumstances, and the duties are mandatory. Such action is the only action that can possibly be restrained by an injunction. That is all the appellants seeks to enjoin.

The "proceeding" prescribed by (and so denominated in) Sections 21 and 22 of the act, is not a new, distinct, or separate proceedings, or an independent action.

It is an essential step in the assertion of the power of the Prerogative Court to issue proper process to enforce its decree. Such jurisdiction continues until the decree has been satisfied. This becomes plain from a brief consideration of the origin, nature and process of that court.

It was the ancient prerogative of the bishop of the diocese to administer the estates of decedents therein. This was done in the Prerogative Court of which the bishop (or "ordinary") was judge. *2 Blackstone's Com. 509-10; 3 Idem., 66.*

That court was transplanted in the Colony of New Jersey by Queen Anne's instructions (November 16, 1702) and commission (December 5, 1702) to Lord Cornbury, the first Royal Governor after the surrender of the proprietary government. *Leaming & Spicer's "Grants and Concessions"* (*Instructions*) *pp. 638-9,* (*Commission*) *pp. 650, 651, 652,* and continued down to the American Revolution, and was adopted by the State Constitution of July 2, 1776, which vested that jurisdiction in the governor as chancellor and ordinary. *Arts. VIII, XXII, 5 Thorpe's Am. Charters, pp. 2596, 2598. In Re Coursen's Will, 4 N. J. E. 408, 412, 415; In Re Hodnett, 66 N. J. E. 329, 337-8.*

When the powers of government were separated by the Constitution of 1844, the office and jurisdiction of the ordinary and judge of the Prerogative Court were vested in the chancellor, where they still remain. *Dickinson's Probate Court Practice* (*1884*) *pp. 2-5.*

From 1844 onward to and including the present time, the State Constitution has provided:

> "The judicial power shall be vested in a court of errors and appeals in the last resort in all causes as heretofore; a court for the trial of impeach-

ments; a court of chancery; a prerogative court; a supreme court; circuit courts, and such inferior courts as now exist, and as may be hereafter ordained and established by law; which inferior courts the legislature may alter or abolish, as the public good shall require."

Art. VI, Sec. I, pgf. 1.

"The chancellor shall be the ordinary or surrogate general, and judge of the prerogative court."

Art. VI, Sec. IV, pgf. 2.

5 Thorpe's Am. Charters, 2608, 2609.

The Constitution of 1776 provided "That the common law of England, as well as so much of the statute law, as have been heretofore practiced in this colony, shall still remain in force, until they shall be altered by a future law of the legislature; * * *" (*Art. XXII*). Like provision has been carried through to the present constitution (*Art. X*) *5 Thorpe's Am. Charters, pp. 2598, 2613.*

By the above inclusion of the Prerogative Court as part of the judicial system of the state, that tribunal became a judicial tribunal, as well as a constitutional court, which could not be altered or abolished except by alteration or amendment of the Constitution. There was nothing to prevent the legislature from extending its jurisdiction to additional subjects, but the legislature could not deprive the decrees of that court of their quality of being conclusive. *Harris* v. *Vanderveer's Executor* (Court of Errors and Appeals), 21 N. J. Eq. 424, 427-8.

The jurisdiction of the Prerogative Court, both in England and in the Colony and State of New Jersey, including its appellate jurisdiction, is discussed in *Dickinson's Probate Court Practice, pp. 7-10, 11-12.*

Adhering to its common law forms and procedure, and regarding succession taxes as kindred to the succession of prosperity, the legislature of New Jersey, from the

enactment of the first succession tax act in 1909 (*N. J. P. L. 1909, Ch. 228, sec. 18, p. 334*), has consistently provided the right of appeal from the appraisement or assessment, to the Ordinary, as the judge of the Prerogative Court, and has conferred upon him "jurisdiction to hear and determine all questions" (*ibid. p. 335*) in the same manner as he has jurisdiction to hear and determine all questions relating to other matters within his appellate jurisdiction.

In New Jersey, as in England, the Prerogative Court has always had the quality of a court of equity, and the rules of equity practice were followed in its procedure. *Bugbee* v. *Van Cleve*, 99 N. J. Eq. 825, 833.

Except for a few special writs (none of which are applicable here), courts following equity procedure were without power to enforce their decrees except by citation for contempt. *2 Daniell's Chy. Pl. & Pr. (Perkins Am. Ed.) 1054 et seq.* For that reason section 21 of the inheritance tax act provides for a citation to bring the parties before the Ordinary to show cause why such tax should not be paid in accordance with its decree. The common law procedure on such a citation was to punish for contempt. Declaratory of that procedure the legislature, in 1900, enacted a law respecting the Prerogative Court, and the power and authority of the Ordinary; section 7 of which reads as follows:

> "7. If any person shall neglect or refuse to obey any citation, or to perform any sentence or decree of the ordinary or judge of the prerogative court, it shall be lawful for such ordinary and such court to cause such person or persons, by process directed to any sheriff of any county of this state, to be taken and imprisoned until he shall obey the said citation, or perform the said sentence or decree; and every sheriff is hereby directed to cause all such process, to him at any time directed, to be duly executed, and to confine the person against whom such process shall be issued, as in execution, until he shall be

> delivered by due course of law; and if any sheriff shall neglect his duty therein, he shall be answerable to the party aggrieved in such manner as he would be answerable upon process of a like nature issuing out of the supreme court." (*N. J. P. L. 1900, Ch. 148, p. 347.*)

In the transfer inheritance tax act of 1909 (now sec. 21) the legislature directed that proceedings on such citation shall conform to the practice prevailing in the Prerogative Court, and added, that the decree of the court thereon shall, upon request of the State Tax Commissioner, be docketed and filed by the Clerk of the Supreme Court, or by the County Clerk of any county, with the effect of a judgment lien upon the property of the estate, and that execution be issued thereon, in accordance with the rules and practice appertaining to judgments of other courts docketed therein, and, particularly, with the practice of docketing in the Supreme Court clerk's office of decrees of the New Jersey Court of Chancery (*N. J. P. L. 1902, p. 524*).

Thenceforward, collection is pursued as prescribed for civil judgments, in "An Act respecting executions" (*N. J. Revision 1877, pp. 389, et seq.; 2 N. J. Comp. Stat. pp. 2243, et seq.*)

Since the only proceeding which the statute prescribes for enforcing the court's decree is that described in sections 21 and 22, the injunction (either preliminary or final) sought by appellant, if granted by the court, could, in effect, do nothing but enjoin the procurement of the citation as a process to enforce obedience to the final decree of the court. The jurisdiction of the court continues, and the matter is still a proceeding in that court until the decree is satisfied. *Ruggles* v. *Simonton,* 20 Fed. Cas. No. 12,120; *Am. Ass'n* v. *Hurst,* 59 Fed. 1; *Leathe* v. *Thomas,* 97 Fed. 136; *Ke-Sun Oil Co.* v. *Hamilton,* 61 Fed. (2d) 215, 218.

The third condition that brings Section 265 into operation is that the proceedings are to be "in any court of a State." But however that may be, there can be no doubt that the hearing before the New Jersey Prerogative Court was a *proceeding in a court*—in fact, it is so described in the bills (*pars. 35, 36, 37 and 42, 43 and 44*).

It is true that the bills assume that the proceeding in the Prerogative Court was a part of the *administrative* procedure under the New Jersey statute (*pars. 37 and 44*). While we do not agree that such procedure is administrative, that question is not important insofar as the present case is concerned, as admittedly the decree of the Prerogative Court was reviewed in and sustained by the New Jersey Supreme Court—which the District Court held is *not* a part of the administrative procedure.

The bills ask for an injunction to restrain the enforcement of the decree of the Prerogative Court by proceedings in aid of execution.

In *Ke-Sun Oil Co.* v. *Hamilton,* 61 Fed. (2d) 215, the Circuit Court of Appeals of the 9th Circuit considered the jurisdiction of the court under Section 265 of the Judicial Code and reviewed the subject at length. The question there was whether the District Court could enjoin the prosecution of judgments on execution.

After reviewing the cases the court held that the power to enter judgment includes the power to issue all proper process to enforce its payment, and that the jurisdiction of the court over the controversy and over the parties, acquired in the primary case by service of process, continued until the judgment is satisfied.

As stated in the *Bouic* case, *supra,* "Proceedings means a prescribed course of action for enforcing a legal right."

We submit that the undisputed facts bring the suits within Section 265.

The District Court so held, saying:

> "It is intimated that because the Supreme Court of New Jersey had come to a judgment, the proceedings in that court similarly had come to an end, leaving the executors free to seek relief where they chose, whether by appeal to the New Jersey Court of Appeals or by suit in the United States District Court. But we are constrained to hold that, having passed by the ending of the administrative proceedings in respect to the tax and having thereafter entered a state judicial tribunal, the executors must abide the consequences, one of which is that proceedings in the state courts were not ended by the judgment of the Supreme Court. The prohibition of Section 265 of the Judicial Code denying the right of any court of the United States to stay proceedings in any court of a state is not limited to proceedings in a court of a state 'up to and including final judgment, but (extends) to the entire proceedings from the commencement of the suit until the execution issued on the judgment or decree is satisfied.' Leathe *vs.* Thomas, 97 Fed. 136, 138; Wayman *vs.* Southard, 10 Wheat. 1, 22. What may happen in consequence of the decision by the Supreme Court of New Jersey remains to be seen. The executors may appeal to the New Jersey Court of Errors and Appeals or the State may proceed to collect the tax validated by the New Jersey Supreme Court decision. The latter, in this state of the case, is not subject to interference by a federal district court; the former constitutes a remedy at law with admittance finally to the Supreme Court of the United States if a valid constitutional question is involved" (*R. 228, 9*).

(*e*)

The suits are in fact against the State of New Jersey.

The discussion under (d) brings us to the next question, namely, whether these suits are not in fact against the State of New Jersey.

In both suits it is alleged that all the defendants are citizens of the United States and residents of the State of New Jersey (*R. 3 and 494*).

In both suits the plaintiffs allege the official positions of each defendant; and the defendants admit these allegations, but point out in detail the duties of each defendant under the Transfer Inheritance Tax (*R. 36 and 510*).

Both bills allege that the defendants are "clothed" under the laws of New Jersey with duties in the assessment and collection of inheritance taxes (*R. 3 and 494*).

In the suit by Elinor Dorrance Hill it is alleged that the plaintiff is a citizen of the United States and a resident of the State of Rhode Island (*R. 3*).

In the suit by the executors it is alleged that Camden Safe Deposit & Trust Company (one of the executors) is a corporation organized under the laws of New Jersey; and that the individual plaintiffs are "citizens and residents of the United States." There is no allegation of *state* citizenship or residence of any of the individual plaintiffs (*R. 493, 4*).

However, the petition for probate, signed and sworn to by each of them, states that they are all residents of New Jersey, except George Morris Dorrance, M. D., who is a resident of Philadelphia, Pa. (*R. 29, 130*), and their residences are so stated in the order of probate under which they exercise their powers as executors—the capacity in which they appear in this suit (*R. 131, 2*).

Each bill prays for an injunction against the several defendants and their deputies "acting under and by virtue of their authority."

There is no pretense that the defendants have any individual interest in the collection of the taxes; their sole interest is as officers of the State of New Jersey, who are charged under the statute with certain duties relating

to the collection of the tax in question, which, when paid, goes into the Treasury of the State of New Jersey.

The various acts which the plaintiffs say the defendants are threatening are admittedly *only* such acts as fall within the line of their respective duties under the statute.

When an officer of the State attempts to enforce an unconstitutional statute, or to enforce a constitutional statute by an unconstitutional method, such officer is considered to be a private wrongdoer, and a suit against him, individually, to restrain such action is not a suit against the State, but against the individual.

But here, the constitutionality of the statute prescribing how the taxes are to be levied is not questioned; the defendants are not wrongdoers, as they would be if there was any claim that the statute itself was unconstitutional, or that the method of enforcing it was unconstitutional.

When an officer acts in the execution of a clear statutory duty, in which no administrative or discretionary power exists, he cannot be said to be engaging in a wrongful act.

There is no legal authority for suits against a state by citizens thereof without the consent of the state.

In *Fitts* v. *McGhee*, 172 U. S. 516, 43 L. Ed. 535, the court said:

> "But it has been adjudged by this court upon full consideration that a suit against a state by one of its own citizens, the state not having consented to be sued, was unknown to and forbidden by law, as much so as suits against a state by citizens * * * or subjects of foreign states."

So far as relates to a suit by a citizen of another state, such a suit is forbidden by the Eleventh Amendment.

There are two lines of decisions on the question whether a suit against state officers is in fact against the state;

one is illustrated by *Ex parte Young*, 209 U. S. 123, and *Raymond* v. *Chicago Union Traction Co.*, 207 U. S. 20, which were followed in *Greene* v. *Louisville and I. R. Co.*, 244 U. S. 499. The other line is illustrated by *Re Ayres*, 123 U. S. 443, and *Missouri, K., T. & R. Co.* v. *Hickman*, 183 U. S. 53.

In the first line the suits were brought to enjoin the enforcement or execution of some act of a state officer performed within his administrative powers in which his personal conduct was alleged to be illegal. Many of those cases were to restrain the enforcement of administrative orders in which the state had no financial interest. In the other line of cases state officers acted under a statutory duty in the name and for the benefit of the state, and for the purpose of collecting revenues which belonged to the state and in which the state officers had no pecuniary or personal interest. In the *Hickman case, supra*, at page 59, the opinion of the court states:

> "* * *, it may fairly be held that the state is such real party when the relief sought is that which inures to it alone and in its favor the judgment or decree, if for the plaintiff, will effectively operate."

It is submitted that both suits are in fact brought against the State of New Jersey.

Plaintiffs do not claim that the statutes under which the taxes in question have been assessed are unconstitutional; the defendants are not charged with any attempt to exercise powers contrary to, or in excess of, those conferred by law; on the contrary, the complaints show that their acts are in accordance with, and as required by, the statutes of New Jersey.

After the assessment of the Tax Commissioner has been sustained by the Prerogative Court and by the New Jersey Supreme Court, how can an attempt by the officers of the State of New Jersey to collect the tax, in accord-

ance with the duties imposed upon them by a constitutional statute, be regarded as a personal wrongful act? The officers are bound by the adjudication that the assessment is valid, and it is their official duty to collect the amounts of tax levied thereon.

The result is that either the present suits are in fact against the State of New Jersey, in which event they are barred, or they are an attempt to stay "proceedings" in violation of section 265.

II.

The judgment of the Supreme Court of the State of New Jersey is res judicata.

The District Court, after reviewing the history of the assessment and of the litigation arising therefrom, pointed out that on the question of jurisdiction there is "no dispute of fact, that is, no dispute as to what has happened. The question of jurisdiction centers in the legal character of the things that have been done and in their legal consequences as they affect the plaintiffs' right to ask for and the power of this court to grant the relief for which they pray" (*R. 226*).

The District Court then continued (italics ours):

> "The theory underlying federal jurisdiction in such cases is that the administrative proceedings of the state in laying the tax must have been completed before the aggrieved taxpayer can call upon a federal court for relief. At that particular point, that is, before anything else shall have been done to correct or annul the assessment, the taxpayer may seek relief in a federal district court under the cited provision of the Judicial Code if an appropriate constitutional question is involved and other jurisdictional requisites are present. But the theory underlying federal jurisdiction in such case goes a step further and is to the effect that if the aggrieved taxpayer should pass the point at

> which administrative proceedings end and should take an appeal or otherwise seek relief in a state court whose jurisdiction of the matter is judicial, then he is bound to the tribunal of his choice and *bound by its decision which, if error, is subject to correction only by the orderly method of appeal.* In such case a shift in the midst of judicial proceedings from a state court to a federal court, by institution of suit in the latter for equitable relief, would, perhaps, be met by a plea of res judicata, and if the federal suit should operate as a stay of proceedings in the state court it is forbidden by federal law (Judicial Code, Section 265)." (*R. 226, 7*).

The general principles as to the doctrine of *res judicata* are well-settled. They have recently been stated by this court as follows:

> "Public policy dictates that there be an end of litigation; that those who have contested an issue shall be bound by the result of the contest, and that matters once tried shall be considered forever settled as between the parties. We see no reason why this doctrine should not apply in every case where one voluntarily appears, presents his case and is fully heard, and why he should not, in the absence of fraud, be thereafter concluded by the judgment of the tribunal to which he has submitted his cause." *Baldwin* v. *Iowa State Traveling Men's Asso.*, 283 U. S. 522, 75 L. Ed. 1244.

As to litigation involving taxes, this court said in *Tait* v. *Western Maryland Railway Company*, 289 U. S. 620:

> "This court has repeatedly applied the doctrine of *res judicata* in actions concerning state taxes, holding the parties concluded in a suit for one year's tax as to the right or question adjudicated by a former judgment respecting the tax of an earlier year. *New Orleans* v. *Citizens' Bank*, 167 U. S. 371, 42 L. ed. 202, 17 S. Ct. 905; *Third Nat. Bank* v. *Stone*, 174 U. S. 432, 43 L. ed. 1035, 19 S. Ct. 759; *Baldwin* v. *Maryland*, 179 U. S. 220, 45 L. ed. 160, 21 S. Ct. 105; *Deposit Bank* v. *Frankfort*, 191 U. S. 499, 48 L. Ed. 276, 24 S. Ct. 154. Compare

United States v. *Stone & D. Co.*, 274 U. S. 225, 230, 231, 71 L. ed. 1013, 1024, 1025, 47 S. Ct. 616. The public policy upon which the rule is founded has been said to apply with equal force to the sovereign's demand and the claims of private citizens. Alteration of the law in this respect is a matter for the law-making body rather than *the courts. New Orleans* v. *Citizens' Bank*, 167 U. S. 398, 399, 42 L. ed. 211, 212, 17 S. Ct. 905. It cannot be supposed that Congress was oblivious of the scope of the doctrine, and in the absence of a clear declaration of such purpose, we will not infer from the annual nature of the exaction an intent to abolish the rule in this class of cases" (p. 624).

See, further:

State Corporation Commission v. *Wichita Gas Company*, 290 U. S. 561;

Nachod Co. v. *Helvering*, 74 Fed. (2d) 164;

Catholic Society, etc. v. *Madison County*, 74 Fed. (2d) 848;

Henderson v. *United States Radiator Corporation*, 78 Fed. (2d) 674;

Grubb v. *Public Utilities Commission*, 281 U. S. 470;

American Surety Co. v. *Baldwin*, 287 U. S. 156.

The general principles are summarized in 34 C. J. 742, 24 A. & E. Encycl. of Laws, p. 709.

The record in the present cases shows that there have been three separate adjudications by New Jersey courts on the fundamental question of the domicil of the testator, and two of these adjudications also passed on the questions which the plaintiffs now seek to raise by their bills of complaint.

Surrogate's Court of Burlington County.

The first proceeding was in the Surrogate's Court of Burlington County, New Jersey; that court admitted the will to probate and granted letters testamentary thereon; obviously no such order could be made except on a finding that the domicil of the decedent was in Burlington County, New Jersey.

In that court the executors filed their duly verified petition for the probate of the will, giving notice to all parties interested, including the plaintiff in suit No. 193.

The jurisdiction of the Surrogate's Court, with reference to the probate of wills, is as follows:

> "The surrogates of the several counties of this state shall take depositions to wills and admit the same to probate, and grant letters testamentary thereon; but in case doubts arise on the face of the will, or a caveat is put in against proving a will, or a dispute arises respecting the existence of a will, the surrogate shall not act in the premises, but shall issue citations to all persons concerned to appear in the orphans' court of the same county, which court shall hear and determine the matters in controversy.
>
> The application for the probate of the will of any person who was resident in this state at his decease, and for letters testamentary thereon, under the preceding section, shall be made to the surrogate of the county in which the testator resided at the time of his death" (*N. J. Laws of 1898, p. 718, secs. 13, 14; 3 Comp. Stats. of 1910, pp. 3816, 7*).

It will be noted that application for probate is made to the surrogate of the county in which the testator *resided* at the time of death; the statute presupposes that the testator was "resident" in New Jersey at his decease.

Pursuant to these provisions, the executors, on October 1, 1930, filed with the Surrogate of Burlington County, New Jersey, their petition for the probate of the

will, signed and sworn to by all of the executors, wherein they "respectfully showeth that they are the executors * * *. That said John T. Dorrance departed this life at his residence in Cinnaminson Twp. in the County of Burlington and State of New Jersey, on Sunday the 21st day of September A. D. 1930, * * * " (*R. 129-132*).

An order was made in the "Burlington County Surrogate's Court," on October 2, 1930, reciting the said application, and further reciting that the surrogate has inquired into the circumstances and taken proof, etc. and adjudging that the instrument offered for probate is the last will, etc., of the decedent, "and the same is hereby admitted to probate" and it is ordered that letters testamentary may be issued thereon to the executors, etc. (*R. 132*).

The parties to the petition for probate are the same as the parties plaintiff in suit No. 194; and the party plaintiff in suit No. 193 is named as a "daughter" of the decedent in the petition for probate.

The said order for probate necessarily adjudicated that the decedent was a resident of Burlington County, New Jersey; as otherwise, under the quoted provisions of the statute, the will could not have been lawfully probated in Burlington County.

Following the admission of the will to probate and the qualification of the executors thereunder, proceedings were taken before the officials of the State of New Jersey, for the purpose of determining the amount of the inheritance tax under the New Jersey statute. The original proceedings were before the State Comptroller, whose duties in that respect were taken over by the State Tax Commissioner pursuant to Chapter 336, New Jersey Laws of 1931, effective July 1, 1931.

After a hearing as provided by the statute, the Comptroller, on May 13, 1931, made the following finding of fact:

> "After a careful consideration of all available data, including oral statements submitted by you (Hon. William D. Lippincott, Proctor for the executors) during your recent appearance, the Department has concluded that the legal domicile of the decedent at the date of his death and for many years prior thereto was Cinnaminson, Burlington County, New Jersey" (*R. 467*).

Following that adjudication by the Comptroller, the amount of the assessment and the tax thereon were determined, first on October 17, 1931; and, after a further hearing, on October 10, 1932 (*R. 469, 475*).

New Jersey Prerogative Court.

From the assessment as finally determined by the Tax Commissioner, the executors appealed to the Ordinary, as provided by section 18 of the New Jersey statute; the parties to that appeal were the executors as petitioners, and the defendant Martin, as Tax Commissioner, respondent.

In that court the issues are set forth in the petition of appeal (*R. 65-73*), and the answer thereto (*R. 73-81*).

In the New Jersey Prerogative Court the same questions of fact and of law were raised as the plaintiffs now allege in the present suits (also some minor questions relating to the amount of the assessment and the appropriate deductions therefrom which are immaterial to the present issues).

So far as pertinent, the issues raised in the Prerogative Court were:

1. The domicil of the decedent.
2. The full faith and credit clause.
3. The due process clause.

(*Par. 13 of Petition; R. 69, 70; Par. 10 of Answer; R. 74*).

The Prerogative Court held that New Jersey had "the sole right" to levy inheritance tax upon the intangible personal estate (*R. 93*); and final decree was entered in said court accordingly, affirming the assessment except as to certain contingent estates, the assessments upon which were vacated without prejudice (*R. 98-100*).

New Jersey Supreme Court.

But the plaintiffs claim that the statutory appeal to the Ordinary (i. e., the Prerogative Court), is merely another step in the administrative procedure whereby the amount of tax is finally determined. The District Court found that it was not necessary to pass upon this point, saying: "Whether the jurisdicton of that Court (Prerogative) is administrative as the executors contend is debatable. We could, conceivably, be persuaded under New Jersey authorities that its jurisdiction is judicial. However, as the matter is not dispositive of the case, we shall assume, without deciding, that its jurisdiction in respect to tax matters is administrative" (*R. 227*).

So, likewise, in this court it is unnecessary to determine whether the proceeding in the New Jersey Prerogative Court is administrative or judicial, as the executors proceeded to review the decree of the Prerogative Court in the New Jersey Supreme Court; and if the proceeding in the latter court is judicial, then its judgment is *res judicata* upon all matters in issue, or necessarily involved, in the judgment of that court—provided, of course, the liti-

gation in that court was between the same parties or their privies.

Looking then at the issues raised in the New Jersey Supreme Court, we find that the executors as the prosecutors of the writ of certiorari again raise precisely the same issues as they had previously raised in the Prerogative Court and as they now seek to raise in the present suit, to wit:

1. The domicil of the decedent.
2. The full faith and credit clause.
3. The due process clause.

Under the practice in New Jersey the Reasons on certiorari constitute the pleadings in the New Jersey Supreme Court. By those pleadings the executors alleged:

1. That decedent was not domiciled in New Jersey, but in Pennsylvania. (See *Reasons 1 to 10; 13 to 18; R. 101-103*).

2. That the judgment of the Pennsylvania Supreme Court as to the domicil of the decedent was binding upon the courts of New Jersey and its Tax Commissioner, under the full faith and credit clause. (*Reasons 11, 12; R. 102; Reasons 23-26; R. 104, 5*).

3. That the New Jersey statute and the assessment thereunder, violated the due process clause. (*Reasons 19-22; 25, 26; R. 103-5*).

The New Jersey Supreme Court, in its opinion, said:

> "We have carefully studied and considered the voluminous records, proofs and briefs herein submitted. The opinions of Buchanan, Vice-Ordinary, in this matter when it came up before him for determination are reported in 115 N. J. Eq. 268, and 116 *Id.* 204. They disclose a very careful analysis and consideration of the proofs as well as

the law applicable thereto; they are comprehensive, clear, sound and correct.

We are of the firm opinion that there has been nothing further presented to this court which would merit or justify a disturbance of the results reached by the learned Vice-Ordinary and with which we are in thorough accord" (*R. 155*).

The judgment of the Supreme Court was entered accordingly, affirming the assessment as corrected by the decree of the Prerogative Court (*R. 156, 7*).

The executors may take an appeal from this judgment to the New Jersey Court of Errors and Appeals, but they have not seen fit to do so; up to the present time they have acquiesced therein; in the absence of such appeal we submit that the doctrine of *res judicata* is a complete answer to the present bills.

We submit, further, that the doctrine applies not only to the suit of the executors (No. 194), but also to the suit of the individual beneficiary (No. 193); she is in privity with the executors who have represented her throughout the proceedings, both in the Surrogate's Court, in the New Jersey Prerogative Court, and in the New Jersey Supreme Court; at the date of her father's death she was of age and could have asserted her individual rights, if they in any way differed from those of the executors.

The appellants argue that the judgment of the New Jersey Supreme Court is not *res judicata*, because, they say, "it has not been acquiesced in by the executors" (*Appellants' Brief, pp. 23, 66*). In this connection the appellants further say that they have "signified their intention" of taking an appeal from the judgment of the Supreme Court within the time allowed by law (*Appellants' Brief, p. 78*).

The simple fact, however, is that it is not the practice in New Jersey to take an appeal merely by signifying an

intention to do so. The procedure on appeal is very simple; the mere filing of a notice, either accompanied by or followed by, a statement of the grounds of appeal is all that is required under the New Jersey procedure. But thus far the appellants have refrained from exercising their right of appeal to the New Jersey Court of Errors and Appeals; the judgment of the Supreme Court is final *until and unless* it is reversed by the higher court, and until and unless they appeal, they acquiesce in the judgment.

These rules are so elementary that it seems almost superfluous to mention them; we do so only because of the constant reiteration by appellants of the argument that the New Jersey Supreme Court is not the highest court of New Jersey, and of their assumption in their argument on this point that an *intention* to take an appeal has the same effect as if the appeal had, in fact, been taken.

III.

Section 266 of the Judicial Code does not apply to this case.

An interlocutory injunction, if granted in accordance with the prayer of the complaint, by a statutory court of three judges, is not authorized by Section 266 of the Judicial Code (U. S. C. Title 28, Sec. 380) because this suit is not brought to suspend or restrain the enforcement, operation or execution of any statute of the State of New Jersey by restraining the action of any officer of such state in the enforcement or execution of such statute, or in the enforcement or execution of an order made by an administrative board or commission acting under and pursuant to the statutes of such State.

This court has jurisdiction, under Section 266, to entertain this appeal direct from said statutory court, con-

vened under that section, *if* the statutory court had jurisdiction.

If the judgment of the New Jersey Supreme Court was that of a judicial tribunal, and the statutory court lacked jurisdiction to grant an injunction because the suit was brought to stay a proceeding in a court of the State of New Jersey, in violation of Section 265, then the suit was not cognizable by the statutory court under Section 266 and appeal does not lie direct to this court. *City Bank Farmers Trust Co.* v. *Schnader,* 291 U. S. 24.

IV.

Appellants have not shown any irreparable injury or other grounds of equity jurisdiction.

If all other of the appellants' claims were admitted, they would not be entitled to an injunction unless irreparable injury was shown; unless they were threatened with danger from which they could not defend themselves other than by the extraordinary remedy of injunction.

In support of their claim that Section 265 of the Judicial Code does not apply in this case, appellants say "No action is now pending in New Jersey which an injunction would stay" (*Brief, p. 22*).

Statements to the same effect also appear at pages 18, 26, 27, 33 and 48 of the brief.

If the only method of collecting the tax is by an action against the executors personally, or an independent proceedings in the Prerogative Court, as claimed at pages 27 and 48, such proceedings cannot be instituted without notice and a hearing and no threat of irreparable injury impends. In such case, Section 265 of the Judicial Code might not apply, but appellants could not obtain an injunction because no irreparable injury appeared.

Taking them at their word, they are not now entitled to an injunction. But while we agree that no irreparable injury is shown, we insist that the appellants seek to enjoin a proceeding in a state court.

The admitted facts do not justify a claim of irreparable injury. In the first place, the appellants admit that they have an absolute right of appeal to the Court of Errors and Appeals; and they state they will take such appeal unless "this action in the United States District Court renders such an appeal unnecessary" (*R. 31*).

If the decision of the Court of Errors and Appeals is adverse they may still apply to this Court for further review.

Under such circumstances, the constitutional rights of the appellants are protected, and they have an adequate remedy available, in the state courts. Having pursued their remedy in the state courts to the entry of a final judgment, that judgment is *res judicata* here. *Grubb* v. *Public Utilities Commission,* 281 U. S. 470, 476-7, 479; *American Surety Co.* v. *Baldwin,* 287 U. S. 156, 165, 167, 169; *Missouri* v. *Fiske,* 290 U. S. 18, 29.

At page 20 of appellants' brief it is stated that the appellees have a technical right to insist upon the filing of a bond in an amount exceeding $24,000,000.00. That statement is not entirely candid.

The brief fails to mention that the $12,000,000 worth of securities was pledged under a voluntary agreement, and that other voluntary agreements for such purpose have been made.

Two of these agreements are set forth in the answers and are identified as Exhibits 12 and 13 in the affidavit of Mr. Kelly, State Supervisor of the Inheritance Tax Division.

His affidavit describes in detail the circumstances under which these agreements were made, and states the sub-

stance of each agreement. The facts as set forth by him were not denied or in any way questioned. We quote therefrom:

"Deponent further says that in the matter of the matured State bonds mentioned in said paragraphs, the State Tax Department did issue waivers on condition that other securities be pledged as alleged, and the executors entered into a voluntary agreement, in writing, with said State Tax Commissioner for that purpose, a true copy of which agreement is attached hereto as Exhibit 12. Said agreement provides that the substituted securities are to be registered in the names of the executors and held by the Camden Safe Deposit and Trust Company, one of the executors, under the joint control of it and the State Tax Commissioner, and the executors receive the interest on said bonds as it accrues. Respecting the third division of said paragraphs and affidavits, respectively, alleging that on June 26, 1934, in order to avoid the posting of a bond of upwards of $24,000,000, the executors placed in escrow securities with an appraised value of $12,360,000; deponent says that under the practice of the courts of New Jersey one who seeks to review a judgment by writ of certiorari, may be required to give bond or security in such amount as may be approved by the Court. On the application by the executors to the New Jersey Supreme Court for the writ of certiorari the court imposed a condition for the issuance of the writ, that plaintiffs furnish security either in the form of a bond or a deposit of adequate securities to secure the amount of the judgment. The Executors chose the second alternative and voluntarily offered to deposit said shares of stock, and voluntarily entered into an agreement with the State Tax Commissioner for that purpose. A copy of that agreement is attached hereto as Exhibit 13. It provides that such securities shall be delivered, without change in registration, to, and be held by, Camden Safe Deposit Trust Company, one of the executors, in escrow, under the joint control of it and the State Tax Commissioner. The Executors

are free to receive the dividends accruing on said securities and are not otherwise hampered in their ownership thereof. * * *

Deponent further says that if and when the Executors are free, and desire, to sell, pledge, transfer or otherwise utilize the bonds or stocks mentioned in paragraph 34 of this affidavit, or any other personal property of the estate, they may do so by giving bond or other security for the payment of the judgment for taxes or by substituting other satisfactory securities. In the present instance, the only security which said Executors have given for, or that is required pending the litigation of these taxes, is the deposit of said bonds and stock in escrow under the terms of said agreements (Exs. 12 and 13), and they are not by that arrangement deprived of any of the benefits or proceeds thereof, and at the same time they are relieved from giving bond, or paying premiums on a bond or other forms of security" (*R. 121, 2*).

At page 18 of appellants' brief it is stated that additional personal property appraised at more than $67,000,000.00 "was also tied up because the State Tax Commissioner and the State Supervisor of the Inheritance Tax Bureau refused to issue waivers permitting the property to be transferred."

At page 19 of appellants' brief it is alleged as a basis for injunctive relief, that the proper administration of the estate is impossible, because of the pendency of this tax appeal (*par. 6*); that the executors are compelled to maintain large cash reserves at a low rate of interest because of the threatened collection (*par. 7*), and that the tax claimed is alleged to constitute a lien on all the property of the decedent's estate and constitutes a cloud on the title thereof (*par. 9*).

Waiver of the tax lien is provided for in section 12 of the act (*p. 119 of Appellants' Brief*), by consent, in writing, of the State Tax Commissioner.

On July 24, 1935 (after this record was completed) the executors of decedent made their first application for a waiver of this tax lien, and that application was granted in the form of an agreement of that date, signed by all of the executors and by the State Tax Commissioner.

If the plaintiffs are fearful that the State of New Jersey will not keep its agreement, they may pay the disputed tax under protest; and if they finally succeed in the litigation, the executors then have the right to recover back the amount erroneously paid. Provision for such refund is made by Transfer Inheritance Tax; Sections 15 and 24 thereof read as follows:

> Sec. 15: "When any amount of said tax shall have been paid erroneously to the State Tax Commissioner, it shall be lawful for the Comptroller of the Treasury on satisfactory proof rendered to State Tax Commissioner of such erroneous payments, and duly certified by him to the comptroller, to draw his warrant on the State Treasurer, in favor of the executor, administrator, person or persons who have paid any such tax in error, or who may be lawfully entitled to receive the same, for the amount of such tax so paid in error; *provided*, that all such applications for the repayment of such tax shall be made within two years from the date of such payment" (*Ex. 8, p. 20*).
>
> Sec. 24: "All amounts becoming due under the provisions of this act shall be paid from the same fund provided in the annual appropriation bill for the payment of refunds to estates pursuant to section fifteen, chapter two hundred and twenty-eight, laws of one thousand nine hundred and nine, as amended * * *" (*Ex. 8, pp. 23, 24*).

It is the established practice of the legislature to make a blanket appropriation each year for the refund of the inheritance taxes that have been erroneously paid; an illustration of such statutory provision is in the Appropriation Act for the year 1934, which provides as follows:

> "Upon approval of the State Tax Commissioner, the Comptroller of the Treasury is hereby author-

> ized and it shall be his duty, to withdraw from the state fund such amounts as shall be required to carry out the provisions of Chapter 238, Laws of 1909, and to refund and pay such claims as may be necessary and the State Treasurer shall pay same upon the warrants of said Comptroller, and there is hereby appropriated an amount necessary therefor." (*N. J. P. L. 1934, p. 580*).
>
> To same effect, see *N. J. P. L. 1935, p. 655.*

Plaintiffs claim that they are not obliged to rely upon the grace of the legislature to refund an erroneous tax. The answer is that the New Jersey Supreme Court has the power to review an arbitrary refusal of state officers to exercise their authority, as prescribed by the statute, in the refund of taxes.

If the taxes are paid under protest, such payment does not prevent the review of the legality thereof. In *Miller* v. *Edward*, 85 N. J. L. 517, the New Jersey Supreme Court said:

> "Neither have we any doubt of the right of the prosecutor to contest by *certiorari* the legality of this assessment, and to have it set aside, although the tax assessed was paid under protest. Such an assessment is analogous to a judgment, and when set aside the prosecutor is restored as near as may be to his original position. This is not a proceeding to recover a voluntary payment of taxes, but to set aside a judgment which required the prosecutor to pay, and his submission to such judgment does not take from him the right to assail its legality. If the judgment be set aside, common honesty demands that he be restored that which was unlawfully exacted under a judgment which had no legal foundation. *Mayor of Jersey City* v. *Riker*, 9 Vroom 225; *Elizabeth* v. *Hill*, 10 *Id.* 555."

So far as the New Jersey courts are concerned, their policy, in the language of the *Miller* case, is "common honesty." This is further illustrated by the case of

Singer Sewing Machine Co. v. *State Board of Assessors*, 54 N. J. L. 90. There the state made a motion to require the prosecutor, on a certiorari to review the tax, to pay the tax as a condition of further prosecution of the writ.

The writ had been allowed by a justice to review the tax on the condition that the prosecutor pay the tax pending the writ, *if* the Supreme Court should so order.

The New Jersey Supreme Court declined to make the order and then proceeded to consider the question whether the writ of certiorari should be permitted "to exert its normal effect in staying proceedings for collecting the taxes."

The court referred to the statute then in effect, relating to refund of taxes—Chapter LXXXVI, p. 118, Laws of 1888, which provided as follows:

> "That when any corporation upon which taxes have been or shall be levied under the provisions of the act to which this is a supplement shall afterwards be found by the state board of assessors to be not liable under the said act for such tax, it shall be the duty of the said board to report and certify to the comptroller of the treasury the fact that such corporation has been found to be exempt from the tax imposed by the said act, and to cancel and declare null and void any taxes which may have been or shall be imposed upon such exempted corporation, and if any corporation has paid or shall pay the tax so improperly levied the comptroller of the treasury shall be and *is hereby authorized* upon receipt of such certificate to draw his warrant upon the state treasurer in favor of the proper officer of such corporation for any and all of such taxes which have been or shall be paid into the state treasury."

It will be observed that the provision of this act that the comptroller shall be "*authorized* * * * to draw his warrant * * *" is substantially the same as Section 15 of the Transfer Inheritance Tax Act, which provides

that when a tax has been paid erroneously "it shall be lawful for the comptroller" to draw his warrant, etc.

In construing the statute of 1888 the court said:

> "* * * We understand this supplement to be applicable to cases in which this court, on *certiorari*, adjudges the tax imposed to be unlawful in whole or in part, and to enable the court in such cases, by proper proceedings against the state board of assessors and the financial officers of the state, to compel the restoration of the unlawful tax paid. Thus the court can administer complete justice between the state and the corporation, without restraining the collection of the tax."

The result was that in that case the court directed that the writ of certiorari should not operate for a stay for proceedings to collect the tax.

In the present case the executors do not have to invoke the doctrine in the *Singer Company* case, that the New Jersey courts can administer "complete justice," as they are fully protected by the agreements between the executors and the State Tax Commissioner; but even if such agreements had never been made, the executors would still have the right to enforce, in the courts of New Jersey, a claim for refund of any taxes that might be found to be erroneously or illegally paid.

In *Arimex Copper Co.* v. *State Board of Assessors*, 69 N. J. L. 121, the Board has assessed the franchise tax against the prosecutor of the writ of certiorari, and the company voluntarily paid the tax as assessed; thereafter, the officers of the company learned that by a mistake of its agent the amount of its outstanding capital stock had been erroneously reported as $5,000,000, whereas, in fact, it was only $2,500,000, and that, therefore, the correct tax was substantially less than the amount paid.

The court reduced the tax to the correct amount, saying:

> "But the attorney-general contends that as the company paid the tax voluntarily, it is not entitled to have the assessment reduced to the legal amount. In view of the rigorous and speedy means authorized by the statute for enforcing the tax, it may be doubted whether the payment can be deemed voluntary; but if it be, still it resulted from a mistake of fact by the agent making the return, a mistake which the company might indeed have discovered by an arithmetical calculation before payment, but which it did not discover until months after payment. Such a payment would not bar a suit for reclamation against another payee than the sovereign, and it does not lessen the moral obligation of the sovereign to see that justice is done."

The question then arose whether the court should make an order to restore the excess. The court held that it had no authority to do so, for the reason that by Chapter 401, page 788, Laws of 1895, it was provided: "No money shall be drawn from the treasury unless it shall have been explicitly appropriated by the annual appropriation act to the purpose for which it is drawn."

As shown by the affidvait of Mr. Kelly, it has been the practice for many years up to the present time, to include in the annual appropriation bill a blanket provision for the refund of claims under the transfer inheritance tax; "and there is hereby appropriated an amount necessary therefor."

V.

The judgment of the Supreme Court of the State of New Jersey does not violate the full faith and credit clause.

In their bills of complaint the appellants alleged a violation of the full faith and credit clause, in that the appellees by threatening to collect transfer taxes, failed to give faith and credit to the judgment of the Supreme Court of Pennsylvania, adjudging decedent to have been domiciled in Pennsylvania (*Par. 63 of bill; R. 16*).

This claim receives only incidental reference in their brief, unsupported by discussion or citation of authorities. (*See Appellants' Brief, pp. 6, 38, 43 and 76.*)

Since the point is not expressly withdrawn, we cannot pass it *sub silentio.*

The New Jersey Supreme Court stated that it was in "thorough accord" with the results reached by the Vice-Ordinary (*R. 156*). Turning to his opinion on the subject —he said:

> "The constitutional provision invoked by the appellants is commonly known as the full faith and credit clause. It is true that under it, and the statute, the Courts of this State are bound to give to the judicial proceedings in Pennsylvania the same faith and credit as they have by law and usage in the Courts of Pennsylvania. But this is true only if the proceedings in the Pennsylvania Court were within the jurisdiction of that Court. It is always open to the Courts of the sister state to inquire into the jurisdiction of the Court which pronounced the judgment in question. When it is demanded of the Courts of one State that full faith and credit be accorded to the judgment of the Court of a sister State, 'an inquiry into the jurisdiction (of the latter Court) is always permitted, and if it be shown that (fol. 133) the proceedings relied upon were without the jurisdiction of the Court, they need not be respected.' Tilt *v.* Kelsey, 207 U. S. 43, at 59;

Thompson *v.* Whitman, 18 Wall. 457; Thormann *v.* Frame, 176 U. S. 350; Burbank *v.* Ernst, 232 U. S. 162.

Concededly the Courts of Pennsylvania had no jurisdiction to assess and levy the tax in question unless the decedent was domiciled in Pennsylvania. It is therefore open to this Court, in the exercise of its right to inquire into the jurisdiction of the Pennsylvania Court, to inquire into, ascertain and determine whether or not the decedent was domiciled in Pennsylvania. If it be determined that he was not domiciled in Pennsylvania, then the determination of the Pennsylvania Court that the transfer inheritance tax assessable in respect of his intangible personalty is due to the State of Pennsylvania, is in no wise binding upon this Court and can in no wise interfere with the right of this Court to inquire and determine if the decedent was domiciled in this State, and to affirm and establish (if it finds that decedent was domiciled in this State) the right of this State to levy the tax in question and the validity of the tax so levied and now under appeal" (*R. 85, 86*).

He then proceeded to consider the fundamental question of domicil (discussed more fully hereinafter), and concluded that the testator was not domiciled in Pennsylvania at the time of his death, and therefore the decision of the Pennsylvania Supreme Court was not binding upon the New Jersey courts (*R. 93*).

But, the appellants say, this clause of the Constitution "does not apply to the Federal courts" citing *Baldwin* v. *Iowa State Traveling Men's Association*, 283 U. S. 522 (*Appellants' Brief, p. 76*).

The proposition as thus stated is somewhat startling; of course it is not accurate.

All that the cited case held, on this subject, was that the provision did not require full faith and credit to be given to a judgment of a Federal Court in one state by a Federal Court in another state.

The court further held that the judgment in question in that case was *res judicata*, notwithstanding that the respondent had entered a special appearance expressly reserving submission to the jurisdiction of the court in which the judgment was entered, saying: "Public policy dictates that there be an end of litigation" (*p. 525*).

We cite this same case in support of our claim that the judgment of the New Jersey Supreme Court is *res judicata*.

The constitutional provision relates to the judgments of a court of a foreign state when properly presented to the courts of another state, as was done in *People &c. New York* v. *Coe Mfg. Co.*, 112 N. J. L. 536 (affirming 10 N. J. Misc. 1161). It imposes a rule of evidence and not of jurisdiction, *Wisconsin* v. *Pelican Ins. Co.*, 127 U. S. 265, 292.

It does not mean that the courts of one state have to accept the findings of fact or conclusions of law of the courts of another state. It merely means that the courts of one state are not permitted to go behind the judgment of the court of another state, except on the question of jurisdiction, when that judgment is duly presented and authenticated in a proceeding in the courts of the sister state for the entry of judgment thereon. The provision applies only for the purpose of enabling a judgment of a foreign state to be established as a judgment in another state.

The New Jersey courts hold that a judgment of the court of a sister state has no effect in New Jersey, except as evidence, and cannot be enforced without a new suit between the same parties on that judgment in the tribunals of this state. *Bullock* v. *Bullock*, 51 N. J. E. 444, 447, 451, *affirmed*, *52 N. J. E. 561, 567, 568-9*, holding that a foreign judgment cannot extend to control property in another state. See also *Wisconsin* v. *Pelican Ins. Co.*, *supra*, (*p. 292*).

The Pennsylvania judgment is not *res judicata* in any court in New Jersey for the following reasons:

(a) *There is no identity of the thing sued for.* In Pennsylvania the suit was a proceeding *in rem* to assess transfer inheritance taxes under the laws of Pennsylvania upon property located in New Jersey, over which the Pennsylvania courts had no jurisdiction. The subject matter of this suit is the validity of an assessment of inheritance taxes under the laws of New Jersey, where all the property of the estate was located and was administered under a will probated here.

(b) *Consequently the cause of action is different.*

(c) *There is no identity of persons or parties.* Neither the State of New Jersey, nor any of its officers, agents or representatives, were parties in the Pennsylvania proceedings. *Blodgett* v. *Silberman*, 277 U. S. 1.

(d) *The Pennsylvania judgment does not control the issue in this proceeding.* The judgment in Pennsylvania does not control the issue of decedent's domicil in the courts of New Jersey. A judgment of a court of a foreign state can have no effect in New Jersey, except as evidence, unless and until it is established as a judgment in the courts of this state by a proceeding instituted for that purpose. *Bullock* v. *Bullock*, 51 N. J. E. 444, 447-550; aff. 52 N. J. E. 561, 567-9; *Bennett* v. *Bennett*, 63 N. J. E. 306, 307-8. It is only in such a proceeding, if at all, that such a judgment is entitled to full faith and credit in the courts of this state under the Constitution of the United States. The plea of lack of jurisdiction is always admissible in such a proceeding, and more so here because the foreign judgment has not been established as a judgment in the courts of our state. Such a judgment cannot be used, and is not entitled to full faith and credit, in a proceeding in another state between different parties to establish a different claim.

This is not a case in which the executors were successful in the court of another state and now seek to enforce that judgment in this court. The successful party in the other state is not seeking to enforce its judgment here. The executors contended in the Pennsylvania courts that decedent was domiciled in New Jersey and they succeeded in the trial court. The Commonwealth of Pennsylvania claimed that decedent was domiciled in Pennsylvania, and its Supreme Court so held.

The executors appealed from the New Jersey assessment, not upon any genuine belief of his domicil in Pennsylvania, but *solely on the strength of the opposite conclusion of the Pennsylvania court.* That decision is merely the opinion of a court. Not being *res judicata,* the Prerogative Court was at liberty to review the evidence on the record before it and reach its own independent conclusion therefrom respecting decedent's domicil; so also with the New Jersey Supreme Court. In their present claim the executors have made a complete "about face" and now claim what, except for the Pennsylvania decision, they never did and do not now believe.

The decision of the Pennsylvania Supreme Court on the domicil of decedent is not controlling in this state. It is a judgment for taxes and is not effective outside of the territorial limits of Pennsylvania. One state cannot sue for taxes in the courts of another state or extend the effect of a judgment in its own state to the territory of another state. *Colorado* v. *Harbeck,* 232 N. Y. 71; *People* v. *Coe Mfg. Co.,* 10 N. J. Misc. 1162, 1163.

Questions involved in the construction and application of state tax laws and in the assessment and collection of taxes thereunder are local questions within the exclusive jurisdiction of the state courts. Power over such questions was not surrendered under the federal constitution and is respected by the federal supreme court as a pre-

rogative of the state courts. No state has the right to extend its judicial arm into another state to interfere with such questions. It cannot be claimed by anyone that the courts of New Jersey are precluded from determining the domicil of decedent; that is, whether he was domiciled in New Jersey or elsewhere at the time of his death.

In none of the cases in which the federal supreme court has held against taxation of intangible personal property in two states was there any question or dispute about the domicil of the decedent. Those decisions are therefore not authority for any contention that because Pennsylvania has obtained a judgment and forced collection of a tax, the courts of New Jersey are deprived of the right to decide whether decedent was taxable in New Jersey.

The executors voluntarily gave the courts of Pennsylvania jurisdiction in the Pennsylvania case, confident that they could prove that decedent was domiciled in New Jersey. They did so to the satisfaction of the Orphans' Court of Delaware County and of two of the justices of the Supreme Court of Pennsylvania, but in that gamble they ultimately lost.

The subject of inheritance taxation is the passing of property by will or under the intestate laws of the taxing authority. The decedent's will was not probated in Pennsylvania and no letters testamentary thereon, or of administration of his estate, have ever been issued in Pennsylvania, and the estate is not being administered under the laws of that state.

No property of decedent located in Pennsylvania passed under decedent's will. All of the property of decedent which passed by the will probated in Burlington County, New Jersey, was located in New Jersey and was not subject to the jurisdiction of the laws or courts of Pennsylvania.

The Pennsylvania courts had no jurisdiction over the executors. If they voluntarily submitted to that jurisdiction it is a matter for which they are personally responsible, and by which the estate or the State of New Jersey can in no wise be affected.

They possessed an adequate remedy, which it was their duty to pursue, in the federal courts to protect the property of the estate against an unlawful assessment in Pennsylvania. That remedy existed in a suit in equity in the federal courts to enjoin the assessment and collection of the tax after the Pennsylvania appraisement had been made, instead of resorting, as the executors voluntarily did, to the judicial proceeding of an appeal to the Orphans' Court of Delaware County to review that appraisement. The adoption of that course would have avoided trying the issues in the state courts of Pennsylvania. *City Bank Farmers Trust Co.* v. *Schnader*, 291 U. S. 24.

The law of domicil is the law of the forum. Every state is free to define and establish its own standards of citizenship and the question of domicil.

In *Pennoyer* v. *Neff*, 95 U. S. 714, the court said:

(p. 722).

> "But, except as restrained and limited by that instrument (federal constitution), they (the States) possess and exercise the authority of independent States, and the principles of public law to which we have referred are applicable to them. One of these principles is, that every State possesses exclusive jurisdiction and sovereignty over persons and property within its territory. As a consequence, every State has the power to determine for itself the civil *status* and capacities of its inhabitants; * * * and also to regulate the manner and conditions upon which property situated within such territory, both personal and real, may be acquired, enjoyed and transferred. The other principle of public law referred to follows from the one mentioned; that is, that no State can exercise direct jurisdiction and

authority over persons or property without its territory."

Numerous decisions of this court hold that judgments of the courts of one state are not entitled to full faith and credit, if the jurisdiction depended on domicil and that that question is open to re-examination by the courts of another state. See: *Burbank* v. *Ernst,* 232 U. S. 162; *Iowa* v. *Slimmer,* 248 U. S. 115; *Andrews* v. *Andrews,* 188 U. S. 14, 35; *Wisconsin* v. *Pelican Insurance Co.,* 127 U. S. 265, 291, 292; *Blodgett* v. *Silberman,* 277 U. S. 1, 18; *Baker* v. *Baker, Eccles & Co.,* 242 U. S. 394, 402; *Bonaparte* v. *Appeal Tax Court,* 104 U. S. 592, 594; *Olmsted* v. *Olmsted,* 216 U. S. 386, 395; *Chase National Bank* v. *Norwalk,* 291 U. S. 431, 440-1.

The rule is summarized in Beale's Conflict of Laws, Volume 2, page 1424, as follows:

> "The judgment of a sister state is presumed to be valid; and if no defect of jurisdiction appears on the record it will be taken as valid in the absence of evidence to the contrary. But evidence will always be admitted to disprove a jurisdictional fact, that is, a fact upon which the judgment of the foreign court was based. Such a fact commonly put in issue is that of domicil."

But assuming for the argument that the Pennsylvania court had jurisdiction over either the parties or the *res,* it had no jurisdiction over the State of New Jersey nor over the defendants, individually, or as officers of New Jersey; and, for the reasons above given, its judgment was not *res judicata* in this state, because, as held in the above cases, it could not preclude the courts of New Jersey from determining for themselves the questions of decedent's domicil, or the jurisdiction of the Pennsylvania court over the subject-matter of that suit.

The question here is the domicil of decedent. If he was domiciled in New Jersey, Pennsylvania had no right

to collect the tax. If he was domiciled in Pennsylvania, New Jersey has no right to collect the tax. The question is entirely one of domicil, *which is to be determined by the law of the forum.* It involves no constitutional question, but merely a question of fact. This was recognized by the executors in their Pennsylvania litigation, as evidenced by the fact that they raised no federal question in that case. *Dorrance* v. *Pennsylvania,* 287 U. S. 660.

VI.

Appellants have been guilty of laches in failing to bring the present suits promptly after the alleged administrative remedies were exhausted.

Assuming solely for the purpose of the argument that the claim of the plaintiffs that the judgment of the New Jersey Supreme Court is administrative rather than judicial, they are, nevertheless, in laches in seeking an injunction against the collection of the taxes.

Considering first the Pennsylvania litigation:

The principal ground of the appeal now made by the appellants to the equitable jurisdiction of the District Court, is that the appellees threaten to deprive them of their property, in violation of the due process clause. But that same point might have been raised by the executors in contesting the Pennsylvania assessment.

In the Pennsylvania litigation the executors consistently alleged that the decedent was domiciled in New Jersey at the time of his death.

After the Orphans' Court of Delaware County, Pennsylvania, had held that the domicil of the decedent was in the State of New Jersey, the Commonwealth of Pennsylvania appealed to the Supreme Court of that State. On such appeal, it was the manifest duty of the executors to

present and argue the question of due process before the Supreme Court of Pennsylvania, since, unless that question were so presented and argued, the United States Supreme Court had no jurisdiction by appeal or certiorari, to review an adverse decision of the Supreme Court of Pennsylvania.

But that question was not presented or argued in the Pennsylvania Supreme Court.

After that decision, the executors applied to this court for a writ of certiorari, and such application was denied solely "on the ground that the Federal question was not properly presented to, and was not passed upon by, the Supreme Court of Pennsylvania." *Dorrance* v. *Pennsylvania,* 287 U. S. 660.

The executors then filed with the Supreme Court of Pennsylvania a petition for reargument, and on January 10, 1933, that court denied the petition for reargument in an opinion which reads:

> "A general reargument of this case was not granted. Reargument was allowed under Rule 84, solely to permit the appellee-executors formally to bring to the attention of this Court the fact that they had filed an amended petition in the court of first instance suggesting a question or questions under the due process clause of the Fourteenth Amendment. On the appeal to this Court, no reference to the matter was made in the arguments though provision therefor is expressly made in Rule 47. The executors now urge that we pass on those questions, suggested in the court of first instance, and reconsider the appeal on a theory not presented when the case was argued here. The Commonwealth objects to such reconsideration, contending that 'They (the executors) deliberately elected to argue the case as one arising under the law of Pennsylvania.'
>
> At the time that this Court decided the question of fact,—in its judgment, a matter for decision according to the law of Pennsylvania,—it was held, for the reasons stated in the opinion filed, that

John T. Dorrance was domiciled in Pennsylvania. As no federal question was involved, or presented by the records or briefs or in the oral argument, for consideration in the decision of the basic matter of fact, none was considered or decided and none remains for decision.

No reason appears for modifying the decision originally made.

Justices Schaffer and Drew dissent from this order." (*R. 154, 5.*)

The neglect of the executors to properly present the point which they now urge renders them guilty of laches insofar as the present suits are concerned.

But the executors are further in laches insofar as relates to the Pennsylvania litigation because in that litigation they might have filed their bill in one of the Federal districts in the State of Pennsylvania to restrain the proceedings on the appraisement by the officers of the State of Pennsylvania. *City Bank Farmers Trust Co.* v. *Schnader,* 291 U. S. 24.

If they are entitled to an injunction against New Jersey or its officers in this case, they were clearly entitled to an injunction against Pennsylvania or its officers *four* years ago. But instead of adopting that procedure, the executors submitted to the jurisdiction of the Pennsylvania courts and took their chances of final success in those courts.

The mere fact that they happened to guess wrong as to the ultimate decision of the Pennsylvania courts is no ground for relief—several years later—in the Federal District Court for the State of New Jersey.

The decision of this Court denying the petition for certiorari to review the decision of the Pennsylvania Supreme Court was filed on December 5, 1932, and a rehearing thereof was denied on February 13, 1933. After the denial of that application, (and certainly after the

denial of the petition for rehearing thereof), the plaintiffs must then have known (if they did not know before), that there was substantial danger that they would eventually be compelled to pay the tax in Pennsylvania; and they must have then known, if they did not know before, that the decision of the Pennsylvania Supreme Court was not conclusive upon the New Jersey courts.

Again they took their chances—and ever since February 13, 1933 to April 2, 1935, they have refrained from filing their bill in the Federal Court of New Jersey—presumably because during this interval of over two years, they preferred to take their chances with the courts of New Jersey.

The executors admit that they have a remedy in the New Jersey Courts; they state in their amended bill, and one of the plaintiffs, George Morris Dorrance, swears (in his supplemental affidavit) that the executors of Dr. John T. Dorrance will take an appeal to the New Jersey Court of Errors and Appeals from the decision of the Supreme Court of New Jersey, "unless prior to the expiration of their time for taking such appeal, this action in the United States District Court renders such an appeal unnecessary" (*R. 31*).

The executors claim they have one year from February 11, 1935—that is, until February 11, 1936, in which to take such appeal. In other words, this is an admission that they not only have the right to take such an appeal to the Court of Errors and Appeals, but that they intend to do so, unless the Federal Court by its action should render such an appeal "unnecessary."

Considering now the New Jersey litigation, we have the following situation:

Under the case of *City Bank* v. *Schnader*, 291 U. S. 24, appellants had the same right immediately after October 17, 1931, and again immediately after October 10, 1932,

to file their bills for injunction in the Federal Court in New Jersey, as they now claim to have.

Instead of that course, the executors took an appeal to the New Jersey Prerogative Court. The conclusions of that court on the fundamental question as to domicil were filed on February 7, 1934—about fourteen months before the present bills were filed. These conclusions dealt specifically not only with the question of domicil, but with *all* the constitutional questions which the appellants now urge.

Since February 7, 1934, the appellants therefore must have known that so far as the New Jersey Prerogative Court is concerned, the decision of that court was against them on the very points which they now urge, including the fundamental question of domicil, and all the constitutional questions.

According to the allegations of paragraphs 37 and 44 of the original bills, the administrative procedure under the New Jersey Inheritance Tax Act "was at an end" when the assessment of the State Tax Commissioner had been sustained by the Prerogative Court.

It is true that appellants, as an afterthought, amended these paragraphs by adding the statement that the procedure in the New Jersey Supreme Court on certiorari is *also* administrative, but they still retain in the amended bills the original allegations that when the assessment had been sustained by the Prerogative Court, the administrative procedure "was at an end."

As we have shown elsewhere in the brief, the appeal to the Prerogative Court is judicial rather than administrative; likewise the certiorari proceeding in the New Jersey Supreme Court is judicial rather than administrative. But however that may be, the appellants again decided to take their chances in the New Jersey Supreme Court by

an application for a writ of certiorari from that court, to review the decree of the Prerogative Court.

Even if the procedure before the New Jersey Supreme Court is administrative rather than judicial, the appellants waited nearly two months before appealing to the Federal Court for relief.

We submit that in view of this history the appellants are clearly in laches; and that for this reason alone, the motion for interlocutory injunction was properly denied.

VII.

The evidence shows that the domicil of the decedent at the time of his death was in the State of New Jersey.

While appellants express their belief, at page 16 of their brief, that this court will not, on these appeals, decide the controversies on the merits, for which reason they say they do not summarize the testimony of certain of the appellants in the Pennsylvania case, and while they submit, at page 98, that these are not appeals on the merits, nevertheless at pages 6, 7-16, 84-98, 97-8 of their brief they do discuss the merits at length, but confine their discussion of the proof "to the averments of the bills of complaint (*R. 2, 493*) plaintiffs' injunction affidavits (*R. 17, 32*), and plaintiffs' reply affidavits (*R. 157-221*)" (*Brief p. 7*); ignoring entirely the remainder of the record, consisting of the answers and exhibits annexed thereto (*R. 35-110, 509-540*), the answering affidavit of William D. Kelly and the exhibits attached thereto (*R. 110-157*), the testimony of George Morris Dorrance (*R. 237-284*) and Ethel M. Dorrance (*R. 362-441*), two of the persons who make affidavits or reply affidavits on behalf of the appellants in these cases (*R. 20-31, 214-16*), the testimony of Arthur C. Dorrance (*R. 285-314*) and William D. Lippincott (*R. 314-362, 441-454*), the abstract of record in the State Tax Department (*R. 455-467*), which includes the statement of

facts submitted to that Department by counsel for the executors (*R. 464-7*), the petition of the executors for opening the assessment (*R. 470-3*), and the abstract of the record in the New Jersey Supreme Court (*R. 477-489*). If the cases are to be considered on their merits, they should be considered on the entire record and not solely upon the allegations of the complaint and the *ex parte* affidavits filed in support of the motion for interlocutory injunction.

The only material in these cases that was not offered and considered before the State Tax Commission in New Jersey, the New Jersey Prerogative Court, and the New Jersey Supreme Court, is the complete alleged diary record of where decedent spent his nights from January 1, 1926, to September 21, 1930 (*R. 159-213*), "information" for which, the affidavit which includes that diary states, was received by affiant from Dr. Dorrance (*R. 158-9*). Part of the entries in that diary, for the whole period, was offered on behalf of the appellants before the State Tax Commissioner in support of their claim of decedent's domicil in New Jersey, and was included in the record before the Prerogative Court and the state Supreme Court.

The text books on domicil herein cited are:

Sir Robert Phillimore "Law of Domicil," (Phila., 1847); Cited as "Phillim" (star paging).

A. V. Dicey "The Law of Domicil" (London, 1879); Cited as "Dicey."

Kossuth Kent Kennan "A Treatise on Residence and Domicil," (Rochester, 1934); Cited as "Kennan."

Abstract definitions of domicil are discussed in *Phillim.* 11-13; *Dicey,* 3-4; *Kennan,* 1-16, but none is intrinsically correct without the aid of the facts in each given case. Domicil is not a place; it is a moral or legal relation subsisting between a man and a place. *Phillim.* p. 12; *Kennan,* p. 60. The relationship is a question of law but the establishment of that relationship is a question of fact, in

which, all authorities agree, intention (*animus manendi*) is the essential and controlling factor.

In addition to the foregoing authorities, the following are submitted for a discussion of the fundamental principles:

1 Halleck's, Int. Law, pp. 444-53, Sec. 5-18;
1 Wharton's Confl. L. (*3d ed.*); pp. 77-90, 116-201;
Story's Confl. L. (*3d ed.*), pp. 83-166;
2 Kent's Comm. 431, *note* (*f*);
Jacobs, on Domicil, pp. 53-99, 113;
10 Am. & Eng. Ency. (*2d ed.*), pp. 9, 18, 20, 21, 24-5, 26-7, 28-9;
19 Corpus Juris, pp. 392-410, 422-441;
3 Moore's Int. L. Dig., pp. 811-854;
1 Beale's Treatise on Conflict of Laws (1935) Ch. 2 pp, 87 *et seq.*

Reduced to a few simple rules, those principles may be stated as follows:

1. A residence at a particular place, accompanied with positive or presumptive proof of continuing it an unlimited time.

2. A domicil once obtained, remains until another is acquired.

3. A change of domicil requires the actual removal from the former domicil *and* an intention to *abandon* the old domicil.

4. A person may have more than one residence but he cannot have more than one domicil.

5. If a person has two or more residences at different times of the year, that will be esteemed his domicil which he himself selects, or describes or deems to be his home, and where he votes or exercises the duties of a citizen.

6. A person is at liberty to choose his domicil, and his motive is unimportant if he acts in good faith.

7. The burden of proof of change of domicil rests upon him who alleges such change.

Phillimore says:

"Whenever the facts and circumstances are such as to beget a doubt whether a domicil has been acquired or not recourse must be had to probable conjectures, and though all cases must in a great measure be dependent on their peculiar circumstances, yet it is most important to bear in mind, that the opinions of jurists and the decisions of Courts of Justice have impressed a character upon certain circumstances as affording the best criteria of domicil, as legal presumptions of the intention of the party deduced from his acts" (*p. 99*).

"The circumstances which appear principally to be relied upon as affording evidence of intention (*Animus manendi*) are the following:

1. Place of Birth or Origin.
2. Oral and Written Declarations.
3. The Place of Death.
4. The Place of Wife and Family.
5. The House of Trade.
6. The Depository of Family Papers and Memorials.
7. The Mansion House.
8. Descriptions in Legal Documents.
9. Possession and Exercise of Political Rights and Privileges.
10. Possession of Real Estate.
11. Length of Residence and lapse of time" (*p. 100*).

The proof on the question of domicil will now be considered; for convenience, it will be classified under the headings, as above set forth by Phillimore.

1. Place of Birth or Origin.

Decedent was born November 11, 1873, at Bristol, Bucks County, Pa. He graduated in 1895 from the Massachusetts Institute of Technology and went to Germany to attend a university where he took his degree of Doctor of Chemistry. On his return from Germany in 1897, dece-

dent entered the employ of the Joseph Campbell Preserve Company in Camden, N. J., and established his residence in that city. He went to Baltimore to be married in 1906, and returned with his wife to his Camden residence and remained there exclusively and continuously until 1911, except for temporary intervals which he and his wife spent with his brother in Philadelphia or at Atlantic City while they were looking for a permanent home in New Jersey (*R. 237-41*). The residence property, known as "Pomona Farm," in Cinnaminson Township, Burlington County, New Jersey, where he died on September 21, 1930 (*R. 243*), was purchased by him in 1909 (*R. 350-2, and 479*), and after extensive alterations and improvements had been made, it became on May 7, 1911, his permanent home (*R. 241-3*).

From that date until November 14, 1925, when his family first occupied the house at Radnor, Delaware County, Pennsylvania (*R. 245*), there is no question that his domicil was in the Township of Cinnaminson, Burlington County, New Jersey.

The sole dispute is whether at that time decedent abandoned his New Jersey domicil and acquired a new one in the Township of Radnor, Delaware County, Pa., and retained it until his death.

(*See Phillim. pp. 101-112, 304-5*).

2. Oral and Written Declarations.

The intention with respect to domicil may be shown by declarations of the party. *Kennan,* 71, 72, 74, 75, 78, 88, 92, 93, 119, 120, 165.

The period to which this heading applies is from the purchase of the Radnor house, April 22, 1925, to decedent's death on September 21, 1930. Those written declarations which were in the form or nature of legal docu-

ments, or related to the exercise of political rights or privileges, will be discussed under separate headings.

Oral Declarations.

William D. Lippincott has known decedent since prior to 1910, when he became (and ever since has been) counsel for the soup company, and was decedent's personal counsel from 1912 until his death (*R. 314-316*).

At various times since the purchase of the Radnor property decedent informed Judge Lippincott that his legal residence was at Cinnaminson and that he did not at any time intend to acquire a legal residence in Pennsylvania (*R. 321-7*).

During the year preceding decedent's death, in a conversation with his brother, Arthur, who talked of acquiring a residence site on the soup company property at Cinnaminson, decedent told his brother that his *home* had been there since 1911, and he would continue to occupy it as such for the rest of his life, regardless of what residences he might have in Pennsylvania, Maine or any other place (*R. 289, 290, 466*).

In October, 1926, decedent was invited to become a member of the Board of Directors of the Pennsylvania Railroad Company, and he was elected to that board October 13, of that year. His residence and post office address was then recorded on the records of that company as Cinnaminson, New Jersey, and that address was never changed (*R. 466*). In discussing that matter with his brother, George, the latter inquired whether a membership on that board would require decedent's residence to be in Pennsylvania. Decedent informed him that if that was necessary he would refuse the election, but that he had been informed that it was not necessary to change his residence from New Jersey. Decedent stated that he intended to remain a citizen of New Jersey and decline that director-

ship if necessary, because he would refuse to surrender his rights as a citizen of New Jersey. His brother, George, advised decedent that he should remain a resident of New Jersey and if a membership on that board of directors amounted to a change of his residence, he, George, would object (*R. 250-1; 280-2*).

Decedent also discussed this subject with his brother Arthur and stated to him that he would refuse the election to that board, because he was a resident of New Jersey and understood that residence in Pennsylvania was necessary thereto. Later decedent informed his brother Arthur that he had conferred with General Atterbury, President of the Railroad Company, and had been assured that Pennsylvania residence was not necessary and that they knew when he was elected that he was a resident of New Jersey. On these conditions decedent accepted the directorship (*R. 288*).

Decedent was a member of the Board of Managers of the Girard Trust Company from 1926 until his death. The annual reports made by the Girard Trust Company to the Banking Department of the State of Pennsylvania, which included the names and addresses of the officers and Board of Managers, give decedent's address as Camden, N. J. (*R. 479*), where his business office was located.

Decedent was Senior Warden of Christ Episcopal Church at Riverton, N. J., for many years, and until his death (*R. 465*).

The records of the vestry meetings showed regular meetings in January, April, July and October of each year. A record of 17 meetings, held between January 11, 1926 and May 9, 1930, showed that decedent was present at two meetings in 1926, three in 1927, one in 1929 and two in 1930 (*R. 489*).

In 1928, decedent discussed with his brother, Arthur, certain questions regarding the management of decedent's

estate. He told his brother that if he had anything to do with the management of that estate his will must be probated in New Jersey and his estate administered there. Decedent instructed his brother to oppose to the "last ditch" any effort to have the estate administered in Pennsylvania (*R. 288*).

In a conversation with his wife, after the purchase of the Radnor property, decedent told her that he was always going to have his residence in New Jersey on account of his business interests there and that it was too far and too inconvenient for him to live permanently in any place in Pennsylvania (*R. 382*).

Written Declarations.

Many of the written declarations of decedent respecting his domicil in New Jersey, except those which are considered under a separate heading as legal or quasi legal documents, are listed or summarized in the abstract of record (*R. 477-489*).

A letter from the decedent addressed to "Republican Voters"—issued in 1924, shortly previous to the September Primary of that year, headed "Pomona Farms, Cinnaminson, New Jersey," and referring to Primary Day on September 23rd, and the selection of a Republican candidate for United States Senator, says:

> "This is a great state. It is your home and my home." "As one voter to another, as one resident of New Jersey to another, I take the liberty to ask you to consider how splendidly Senator Walter E. Edge measures up to this big job" (*R. 480*).

A letter of December 4, 1925, from decedent to the Social Register, asking to be listed therein in two places, says:

> "My home at Cinnaminson, N. J., and house known as 'Woodcrest,' Radnor, Pa." (*R. 481*).

Letter of January 11, 1926 from decedent to Senator Edge, suggesting repeal of "Seven Sisters" (referring to certain corporation laws of the State of New Jersey) (*R. 482*).

January 15, 1926: Letter from decedent to State Senator Davis, suggesting appointment of committee to revise New Jersey Corporation Laws (*R. 457 and 482*).

September 28, 1926: Letter from decedent to the society editor of the Philadelphia Ledger referring to a published statement therein that decedent's daughter would entertain at "Woodcrest," Radnor, on October 10th, and stating that the statement was not correct as there would be no entertainments on that date "either at 'Woodcrest,' Radnor, or at my home, 'Pomona Farm,' Cinnaminson, N. J.". (*R. 458*).

December 6, 1926: Letter from decedent to Laura Bishop, Burlington, N. J., stating that he is perfectly satisfied with the servants "I now have at my home at Cinnaminson" (*R. 458*).

January 10, 1927: Letter from decedent to Reverend Richard Gurley, St. Martin's Church, Radnor, Pa., stating that

> "inasmuch as we are maintaining our residence at Cinnaminson, N. J., and membership in Christ Church, Riverton, N. J., in which church I am Senior Warden, it is not Mrs. Dorrance's or my desire that we or our children be included in the membership of St. Martin's Church, Radnor" (*R. 458*).

April 1, 1927: Letter from decedent to Thomas N. McCarter expressing a desire to correct the impression contained in Mr. McCarter's letter of March 29, 1927, that decedent is no longer a Jerseyman.

> "For twenty years I have maintained a residence in New Jersey, and still do. Our home at Cinnaminson, N. J., is always open, and Mrs. Dorrance, the

children, and I get a great deal of pleasure spending a portion of each month there, except when we are in Europe" (*R. 458*).

November 6, 1927: Letter from decedent to John M. Scott, of Philadelphia, acknowledging a letter of the day before inviting decedent to become a member of the Pennsylvania Society of the Sons of the Revolution. Decedent expresses doubt as to his eligibility therein "as I am a resident of Cinnaminson, Burlington County, New Jersey, and propose to maintain my residence there" (*R. 459*).

March 15, 1928: Letter from decedent acknowledging receipt of a letter of a previous date inviting decedent to attend a dinner at Philadelphia to discuss public charity for Pennsylvania and stating,

> "I am a resident of the State of New Jersey, and would consider it quite out of place for me to discuss methods by which residents of Pennsylvania should collect and distribute their charity" (*R. 459*).

April 27, 1928: Letter from decedent to Eldridge R. Johnson, stating that he hastens to correct an impression of Mr. Johnson that decedent is non-resident in the State of New Jersey, stating—

> "I am now, and have been a resident of the State of New Jersey continuously since I first voted, and Mrs. Dorrance, our children and I propose to continue to hold our residence in New Jersey, where we maintain a home in which we keep a minimum of four servants throughout the year. Also, we will continue to be more interested in the welfare of our State.
>
> "While at present my family do not go as often as they desire to Cinnaminson, this is due to the illness of my mother and sister, who live there, and our fear that the children might annoy the invalids. This year we expect to spend at least two months at home in Cinnaminson" (*R. 459*).

3. *The Place of Death.*

The place of death is not necessarily controlling, but, taken in connection with the other circumstances in this case, it is peculiarly significant and persuasive here. In addition to the Radnor house and the Cinnaminson house, decedent had summer homes on the New England coast. In the summers of 1926 and 1927 his family occupied a house at Jamestown, Rhode Island. In the summers of 1928, 1929 and 1930 they occupied a house at Bar Harbor, Maine (*R. 376-380*).

Spring and summer were the busy seasons at decedent's factory and he spent much of his time there, staying at the Cinnaminson house while the family were at the summer residences (*R. 376*). During the summer of 1930 decedent remained more than usual at his Bar Harbor house on account of his health. He returned with his family on September 14, 1930, to the Cinnaminson house and never returned to his place of business. He had an attack on September 16, and died September 21, 1930, surrounded by his family (*R. 381*), and was buried from Christ Episcopal Church at Riverton, of which decedent's family were members and of which decedent had for many years been Senior Warden.

(See *Phillim. p. 115.*)

4. *The Place of Wife and Family.*

The residence of a man's family at another place for part of the time, or for a substantial part of the time, does not affect a person's domicil, 3 *Kent's Com.* 431, note 1(b), *Kennan*, p. 36, 78, 114, 117, 173.

The purpose of the purchase of the Radnor house in May, 1925, and the beginning of its occupancy on November 14 of that year, was to provide a place for enjoyment by decedent's wife and family of the social advantages of the neighborhood, and for access by their children to the

private schools which they attended, during the winter seasons. They spent the greater part of the social and school season at the Radnor house, but it was closed in the summer. They spent the summer seasons in New England, and some part of each year in Europe, and all of them spent a part of the time, some more than others, at the Cinnaminson house, which is discussed under the heading of "The Mansion House."

It cannot fairly be said that decedent maintained his wife and family separately or permanently at the Radnor house. It was the "show place" of the winter season.

Leaving out of consideration, for this discussion, the time which the family spent in New England and Europe, which was a substantial portion of each year, the question of place of wife and family is left for determination as between the Cinnaminson house and the Radnor house.

(See *Phillim. pp. 115, 118, 23.*)

5. The House of Trade.

The fact that one has an important and regular business which has the elements of permanence is a much stronger indication of intent than in the case of one without any business affiliations. To retain an interest in a business in the locality from which one has removed is to weaken the proof of abandonment and requires some explanation (*Kennan*, p. 220).

Decedent entered the employ, in 1897, of the Joseph Campbell Preserve Company, in Camden, N. J. That company was later changed to the Joseph Campbell Soup Company, and at some undisclosed time thereafter he acquired an interest in the business. Since June 3, 1915, he has owned the entire capital stock of the company (*R. 255*), consisting of one million shares of common stock, and 120 thousand shares of preferred stock, appraised at $79,033,969.55, and has ever since been President and has

had full charge and control of the business and attended personally to all of its details, until his death (*R. 243-4*). It was reorganized in 1922 into the Campbell Soup Company, a corporation of New Jersey (*R. 315-6*).

The factory of the company and its general offices, which was the only business office of decedent, are located in the City of Camden, N. J.

At the time of decedent's death Campbell Soup Company was one of the largest in the United States engaged in canning and preserving food products (*R. 286*). The plant occupied 16 acres of land and employed from 4,000 to 5,000 people according to the season, between 65% and 75% of whom were residents of New Jersey. The company payroll was $60,000 per week. The maximum daily output of the factory was more than 9 million cans of soup. In 1930 it contracted for 24,000 acres of tomatoes in New Jersey, in addition to large quantities of other vegetables (*R. 287*).

To the affairs of that company decedent devoted his constant and exclusive attention. He supervised every detail of the business, including experimental development of raw materials and the operation of the farms from which he obtained his supplies (*R. 244*). Around his home at Cinnaminson, located conveniently near his factory in Camden, and in the agricultural area from which he obtained his supplies, he developed and operated extensive experimental farms for the purpose of improving the quality of seeds and plants of vegetables used in his business, and he continued his active personal interest in those enterprises up to the time of his death.

The reasons why decedent insisted on being a resident of New Jersey were the subject of conversation with his associates at business and at his meals at various times. Decedent said every man connected with Campbell Soup Company ought to reside in New Jersey and if decedent

did not stay in New Jersey he could not insist upon the rest living there. Decedent thought it essential to the business that their contacts should be in New Jersey (*R. 280*).

Aside from his office at the soup factory, decedent's house at Cinnaminson was the center of his business interest and activities. He stayed there more than his family, because he said it was too long a run to Radnor. He remained there during the summer season when his business was most active. The property, as he acquired it, contained 76 acres (*R. 479*).

(See *Phillim. pp. 122-5*).

6. Depository of Family Papers and Memorials.

Decedent left no real estate. The amended and corrected return of October 17, 1931, submitted by the executors to the Tax Commissioner, contains a recapitulation of all the property of decedent, with each kind enumerated, shows an aggregate of $115,121,518.92 (*R. 468-9*). Upwards of $110,000,000 of his estate was in the form of intangible personal property, all of which except $2,500,000, were kept in safe deposit boxes in banks in Camden, N. J.

Decedent's only business office was in Factory No. 1 of the Campbell Soup Company in Camden, N. J. nigh unto the places where his wealth was deposited, and where he had convenient access thereto and possession thereof at all times.

(See *Phillim. p. 125.*)

7. The Mansion House.

The Cinnaminson house is regarded as the Mansion House of decedent for the purpose of this heading.

Decedent acquired the property consisting of the house, grounds and surrounding farm lands, about 76 acres in all, by deed of November 20, 1909. On December 29 of the same year he conveyed it to the Joseph Campbell Soup Company (*R. 479*), in which decedent was then interested and of whose entire capital stock decedent afterward became the owner. He occupied the house and grounds under a lease from the soup company.

After alteration and enlargement of the house, decedent, with his wife and two children moved in on May 7, 1911. The remaining three children were born while that place was their sole residence—two of them in that house.

The house is built of brick and was about 50 years old. It was generally remodeled and enlarged by decedent after its purchase. It was surrounded by 7 acres of house grounds and contained large living rooms on the first floor, with eight bedrooms, three baths and an enclosed porch on the second floor, and four bedrooms and two baths on the third floor. The grounds were well kept and contained many beautiful old trees. The remainder of the 76 acres was cultivated as an experimental farm for raising vegetables for the soup company (*R. 259, 290-1; 301*).

The house was completely furnished and none of the furniture and equipment, except a chair and bed, were taken from that house to furnish the Radnor house (*R. 370*). The Cinnaminson house was never closed from the time they first occupied it in 1911 but was always kept open and in order for occupancy (*R. 406*).

When they moved in they had two children. They began with three servants and two nurses, and other servants

were added as occasion required, together with a chauffeur and an outside man. When they occupied the Radnor house in November, 1925, they took with them two governesses and a chauffeur from the Cinnaminson house but left three servants and a houseman.

The Cinnaminson house was always equipped with servants, more or less in number as the occasion required, and there were two servants there at the time decedent died in that house. When the family were at Cinnaminson they usually brought along some of their servants from Radnor, including the nurses for the children. A supply of clothing was kept at Cinnaminson and decedent's room there was kept in order at all times and was equipped with everything necessary in the way of clothing. Decedent said it was too long a run to Radnor and for that reason he would stay at Cinnaminson more of the time. He stated that he was always going to live there (*R. 289-290*).

No change was made in the house or its equipment after the occupancy of the Radnor house (*R. 293*). It was fully equipped with furniture, dishes, linen, beds, etc., just as it was before the Radnor house was purchased (*R. 252, 404, 409*). Groceries and provisions were kept there, after as before, the purchase of the Radnor house, and the family preserving was done there from the fruit of the trees on the grounds, every summer and fall as before. The house was heated in winter (*R. 373*).

Mrs. Dorrance continued to supervise the management of the servants and to purchase the food and other supplies, and they frequently entertained their friends and relatives there. There were plenty of servants there (*R. 274, 278, 293-294*).

The extent of the occupancy and entertainment by decedent's wife and children at the Cinnaminson house was limited between 1926 and 1929 by the illness of

decedent's mother and sister, who lived with him there (*R. 305, 404, 411*), attended by two nurses, in addition to the regular servants of the house (*R. 404*).

Decedent's mother was ill for about three years. She and his sister were brought to Cinnaminson in the fall of 1925. The sister died on June 16, 1928, the mother having died previously (*R. 247-8*). They were assigned rooms at the Cinnaminson house, while the remaining rooms were reserved for decedent and his family (*R. 249*).

The testimony respecting the amount of time decedent and his family spent in Cinnaminson after the purchase of the Radnor house is given chiefly by Dr. George M. Dorrance, Arthur C. Dorrance and by Mrs. Dorrance. Considerable information of that character was also given by Judge Lippincott in the statement of facts submitted with letter of May 2, 1931 to the Comptroller (*R. 236-284, 285-314, 362-440, 463-7*).

8. Descriptions in Legal Documents.

Under this heading are included those documents or declarations which are legal in their nature or are made pursuant to legal requirements.

Wills.

The execution of one's will in accordance with the laws of a particular place is evidence of domicil there. *Dupuy* v. *Wurtz*, 53 N. Y. 556.

The recital of one's residence in a solemn document, like a will, may fairly be presumed to speak the truth. Few written declarations can raise stronger presumptions of the testator's purpose and intention, or be more controlling in the determination of domicil. (*Kennan*, pp. 179, 180-1, 186-7.)

The Radnor house was purchased by deed dated April 22, 1935 (*R. 482*).

Between that date and May 15, 1928, when his last will was made, decedent made eight separate wills or codicils, in each of which he recited himself as "of the Township of Cinnaminson, in the County of Burlington and State of New Jersey," namely:

May 5, 1925 Will (*R. 477, 331-2*).
May 6, 1925, Codicil (*R. 478, 333*).
May 25, 1925, Will (*R. 478*).
June 30, 1925, Codicil (*R. 478, 333*).
July 30, 1925, Will (*R. 478*).
July 30, 1925, Codicil (*R. 478*).
October 17, 1925, Codicil (*R. 478, 334*).
May 15, 1928, Last Will (*R. 460*).

The recital of decedent's residence contained in each of those wills and codicils is the same as was contained in nine separate wills and codicils of decedent made prior thereto, from March 2, 1912, to May 19, 1924 (*R. 357-359*).

The will of July 30, 1925, gave to decedent's wife all the household goods, effects, etc., "In the house where I now reside, in Cinnaminson Township, Burlington County, New Jersey," and that provision was contained in his last will of May 15, 1928, where it appears in paragraph seventh (*R. 127*).

The codicil of July 30, 1925, appoints the appellants in No. 194 as executors and trustees, and contains a provision revoking the appointment of any of them who shall fail or refuse to probate the will, within 60 days after his death, before the Surrogate of Burlington County, New Jersey, or the Ordinary of the State of New Jersey. This provision was contained in all subsequent wills and codicils, including the last will of May 15, 1928 in which it appears as the thirty-third paragraph, limited to 30 days after his death (*R. 477*).

All the wills and codicils above mentioned, from the will of March 2, 1912, to the will of May 15, 1928, were drawn by Judge Lippincott, pursuant to decedent's instructions (*R. 332-335, 356-358*). After the execution they were all delivered into the possession of Judge Lippincott, who says that every word in each of them was dictated by him (*R. 359*).

The purpose of the trust created by the will was discussed by decedent with Judge Lippincott at different times. Decedent stated that he wanted to keep intact the soup company business, and his stock-holdings therein. Discussions on this subject began prior to the making of decedent's will of May 23, 1925, and continued until the making of the will of May 15, 1928 (*R. 316-317*). Decedent wanted a plan devised, whereby the income of his estate, above the amount necessary for the support and maintenance of his family, could be applied for federal and state inheritance taxes. He wanted the income accumulated and he authorized his executors to repair any depreciation of capital through the payment of such taxes, by borrowings, if necessary, and reimbursed out of income, so that the corpus of his estate would not have to be sold to meet tax payments (*R. 318*).

Judge Lippincott advised decedent that the plan contained in the will was legal in New Jersey, but could not be carried out in Pennsylvania (*R. 319*) because, under the laws of Pennsylvania, decedent's wife could take against the will and could insist upon her allotment of one-third of the personal estate, which she could not do under the laws of New Jersey (*R. 319-320*). In this opinion Judge Lippincott was supported by Justice Black (formerly of the New Jersey Supreme Court), who cited as authority the cases of *Adamson* v. *Ayres*, 5 N. J. E. 349; *Arnault* v. *Arnault*, 52 N. J. E. 801; *Wintermute's Will*, 27 N. J. E. 447; affirmed 28 N. J. E. 437.

The discussion between decedent and Judge Lippincott, about the provisions of the several wills, occurred many times (*R. 320*), and section Thirty-third (of the present will) requiring probate in New Jersey, was put on the codicil of July, 1925, after, and on account of, the purchase of the Radnor property (*R. 322, 345*). Decedent wanted his will probated in New Jersey (*R. 323*). He said that a number of persons had asked him if he was a Pennsylvania resident and that he had replied that he was not, and that he did not intend to leave New Jersey (*R. 324*). The same provision was put in the will of May 15, 1928, requiring probate in New Jersey, except that the time limit was reduced to 30 days (*R. 324*). In connection with the making of the will in May, 1925, Judge Lippincott advised defendant that since a previous conversation of theirs he had examined the law of domicil in New Jersey and found that if decedent retained his New Jersey residence, and had no intention of abandoning it as his home, his domicil was clearly in New Jersey (*R. 325-6*). Decedent then advised Judge Lippincott that he intended to retain his Cinnaminson home and keep it always open and supplied with servants and that he would always be there in the summer, spring and fall (*R. 326-327*).

Decedent's will of May 15, 1928, remained in the possession of Judge Lippincott (except for a short time in 1929) from the time it was made until he took it, a few days after decedent's death, to the Surrogate of Burlington County for probate (*R. 348-9*), according to instructions contained in the wills and codicils of decedent from 1925, until the making of the last will (*R. 349*), and in pursuance to decedent's instruction to Judge Lippincott in the summer of 1929, that he, Judge Lippincott, was to see to it that the will was probated in Burlington County (*R. 349*).

Domicil Agreement.

At the time of the preparation of the codicil of December 30, 1925 (*R. 346*), decedent asked Judge Lippincott if his wife had a right to take her legal residence in Pennsylvania, and decedent retain his in New Jersey. Judge Lippincott advised decedent that the domicil of a wife followed that of her husband, but that there was some talk in New Jersey of giving a wife the right to take a domicil where she pleased and that the matter might be covered by agreement (*R. 327*). At that time decedent gave Judge Lippincott notes for the preparation of such an agreement (*R. 327*), and he prepared the agreement in duplicate; one for Mrs. Dorrance and one for decedent, and those agreements were signed in decedent's office in Camden (*R. 327, 477*). Although the agreement was prepared in December, 1925, it was not signed until January, 1926. Judge Lippincott testified that the agreement was made in good faith and not for the purpose of creating evidence of declaration of intention. Judge Lippincott advised decedent that under such circumstances the agreement was valid (*R. 346*).

That agreement is dated January 11, 1926, and was intended to commit decedent and his wife against changing their domicil from New Jersey without notice to, or consent of the other, as therein provided (*R. 466, 7*).

It recites that the parties are—

> "Of the Township of Cinnaminson, County of Burlington, and State of New Jersey.";

the purchase by them, on April 22, 1925, of the Radnor residence, and that decedent and his wife—

> "are still residents of 'Pomona Farms' in the Township of Cinnaminson, in the County of Burlington and State of New Jersey, and still keep their house open at that place and intend to occupy the same during a portion of each year."

The parties mutually agree:

1. "That the residence of said John T. Dorrance, and Ethel M. Dorrance, his wife, shall continue to be at 'Pomona Farms,' in the Township of Cinnaminson, County of Burlington and State of New Jersey, as heretofore, notwithstanding the fact that * * * (they) may occupy during a portion of each year said lands and premises known as 'Woodcrest' * * *"

2. That neither party will change his or her residence from "Pomona Farms," Cinnaminson Township, Burlington County, New Jersey, to any other place, or undertake to do so without the written consent of the other.

3. That neither party will vote in any other voting place or election district than that in which said "Pomona Farms," at Cinnaminson Township, Burlington County, New Jersey, shall be located without the written consent of the other. The parties being now voters and are registered as such therein.

4. That neither party will file his or her income tax return in any other internal revenue district than that in which said "Pomona Farms" shall be located.

5. That neither party will claim to have any other residence than that at "Pomona Farms" in the Township of Cinnaminson, County of Burlington and State of New Jersey, without the written consent of the other.

6. In case of the death of either party the will of the one so dying shall be offered for probate in the office of the Surrogate of the County of Burlington in the State of New Jersey, without objection by the other as to the jurisdiction of said Surrogate to admit said will to probate, unless prior to the death of the one so dying it shall be mutually agreed between the parties in writing that their residence shall be changed to some place other than the Township of Cinnaminson, County of Burlington.

7. This agreement shall continue in full force and binding effect upon both parties unless changed in writing, signed by the parties (*R. 456, 7*).

At the time that agreement was made the domicil of the wife was that of her husband, and she was incapable of choosing a separate domicil, *Estate of Hartman*, 70 N. J. E. 664. In 1927 the Legislature of New Jersey passed an act (*Chapter 168, N. J. P. L. 1927, p. 325*) providing—

> "The domicil of a married woman shall be established by the same facts and rules of law as that of any other person for the purposes of voting, office holding, testacy, intestacy, jury service, taxation."

There is nothing in the record to indicate that Mrs. Dorrance ever established, or attempted to establish, a separate domicil, but if she did, by either act or deed, it was not binding on decedent and did not affect his domicil. On the contrary, in the sworn application of October 1, 1930, for the probate of decedent's will in Burlington County, she, with the other executors, stated that her then post office address was Riverton, New Jersey, and she gave the same address for her four minor children (*R. 129, 130*).

As one of the executors and in support of the contention that he was domiciled in New Jersey at the time of his death, she, with the other executors, put that same agreement in evidence before the Tax Department of New Jersey in 1931 (*R. 465*), and in the Pennsylvania case in 1932 as proof of his domicil in New Jersey (*R. 477*).

Passports.

Decedent and his wife, sometimes with other members of the family, went to Europe each year for a good many years. For 15 years or more prior to decedent's death his passport applications or declarations gave his place of residence as Cinnaminson, Burlington County, New Jersey. Several of these in which he declared his residence

at Cinnaminson, Camden, New Jersey, are included in Exhibit A-37 (so marked in Penn. litigation; see *R. 481*).

Decedent's passport applications were prepared by Mr. Kelleher, an officer of the soup company, who also prepared, and handled many of decedent's personal matters respecting automobile registrations, drivers' and commercial licenses, custom house declarations, etc. (*R. 466*).

His instructions from decedent were that his "place of residence" was Cinnaminson (*R. 467*).

Powers of Attorney.

Powers of attorney were executed and acknowledged by decedent May 15, 1928; March 26, 1929; September 12, 1929; all reciting decedent as "of the Township of Cinnaminson, in the County of Burlington and State of New Jersey" and showing that they were acknowledged before a notary public in that county and state (*R. 478, 9*).

Deeds.

Recitals in deeds are usually regarded as important indicia which are held to control in the determination of domicil. *Kennan*, p. 107.

When decedent and his wife acquired the Radnor house on April 22, 1925, the deed referred to them as "of Riverton, New Jersey" (*R. 482*). Occupancy of that property began on November 14 of that year. In a deed of June 30, 1928, by which decedent acquired some additional property adjoining the Radnor property, he and his wife are described as "of the Township of Cinnaminson, County of Burlington and State of New Jersey" (*R. 482, 3*). In another deed dated July 27, 1929, by which decedent and his wife acquired additional lands at Radnor, they are described as "of the Township of Cinnaminson, Burlington County, New Jersey" (*R. 483*).

In a lease dated April 4, 1930 (the year of his death), by which decedent leased a house at Bar Harbor for that summer, he is therein described as "of Cinnaminson, New Jersey" (*R. 483*).

Corporation Reports.

From 1926 until his death decedent was a member of the Board of Managers of the Girard Trust Company of Philadelphia. The reports of that company required by law and filed with the Banking Department of Pennsylvania, from March 23, 1927 to March 17, 1930 (ten in all) list decedent as follows:

"John T. Dorrance, Camden, New Jersey" (*R. 479*).

The annual reports of the Campbell Soup Company filed, as required by law, with the Secretary of State of New Jersey, for the years 1923 to 1930, inclusive, were executed by decedent as President, except the reports of 1925 and 1929.

In the reports of 1923, 1924, 1926, 1927 and 1929 he gave his address as Camden, New Jersey. In the report of 1925 his address was given as Riverton, New Jersey. In the reports executed by himself for 1928 and 1930, his address is given as Pomona Farms, Riverton, N. J. (*R. 480*). They are required by law to show the residence of the officers of the company. *2 Comp. Stat. 1625, Sec. 43 Corp. Act.*

Director's Oaths.

As a Director of the National Bank of Commerce, from 1924 to 1929, inclusive, decedent was required to take an oath of citizenship. That oath (for each year) stated that he was a citizen of the United States and "a resident of the State of New Jersey (*R. 482*).

Motor Vehicle Applications.

Applications for motor vehicle registrations were executed by decedent, under oath, September 29, 1927 (three applications); October 25, 1928 (three applications); October 28, 1929; October 30, 1929 and January 2, 1930, in which he gave his address as Camden, N. J. (*R. 484*).

Applications for driver's licenses were made by decedent under oath to the New Jersey Motor Vehicle Department on November 22, 1927, October 26, 1928, and November 20, 1929, in all of which decedent gave his residence as Cinnaminson, Riverton, Burlington County (*R. 483*).

Applications for certificates of title to automobiles made by decedent under oath were filed with the Pennsylvania Department of Highways, October 16, 1923, November 5, 1923, August 21, 1925, February 27, 1928, June 20, 1929, July 21, 1930, in each of which decedent gave his post office address as Camden, New Jersey (*R. 484*).

Decedent obtained a driver's license in Pennsylvania for the year 1930 on the application in which he gave his address as Camden, Camden County, New Jersey (*R. 482*).

Life Insurance.

The application of decedent, dated May 8, 1926, for insurance gave his residence as "near Riverton, Camden County, New Jersey" (*R. 663-5a*), and stated therein that his only residence during five years previously was Riverton, New Jersey, and that no change of residence was contemplated (*R. 484*).

Judge Lippincott, who had been counsel for the Soup Company since 1910 and for decedent personally since 1912, and had handled all of his legal affairs from that time until decedent's death, stated in the statement of facts of decedent's domicil in New Jersey submitted with his letter of May 2, 1931 to the Comptroller of New Jersey

that—"*Every document of which I have any knowledge signed by Dr. Dorrance states his residence as being in Cinnaminson Township, Burlington County, N. J.*" (*R. 466*).

(See *Phillim. pp. 13p-1*).

9. Possession and Exercise of Political Rights and Privileges.

Voting.

No criterion of domicil has been accorded more weight, or been regarded as more conclusive evidence, than the exercise of the right of voting. *Kennan,* pp. 157-161, 164, 166, 167, 168, 170, 171, 174, 219.

The poll books in the custody of the Township Clerk of the Township of Cinnaminson, Burlington County, New Jersey, containing records of ballots issued to voters at primary, general, and other elections in that township (with certain books missing), show that decedent voted there at primary elections in 1920, 1921, 1924, 1928 and 1929; general elections in 1924, 1925, 1926, 1927, 1928 and 1929; special election 1927, and that his wife voted there at primary elections 1920, 1921, 1924, 1927, 1928 and 1929; general elections 1924, 1925, 1926, 1927, 1928 and 1929; special election 1927. Neither decedent nor his wife ever voted in Radnor Township, Delaware County, Pennsylvania (*R. 479, 480*).

On March 20, 1930, decedent wrote a letter to Judge Lippincott inquiring whether the New Jersey law permitting absentee voting was still in effect. He said that he and his wife were especially anxious to vote in Cinnaminson Township, the place of their residence, at the then coming election and desired absentee permission. Judge Lippincott states that decedent was greatly disappointed when he informed him that absentee voting permission

could not be obtained (*R. 467*). Decedent died before the general election in 1930.

Taxes.

The payment of personal taxes is strong corroboration of the intent to remain and of the willingness to share the burdens of the community, and is one of the criteria more frequently resorted to in testing the question of domicil. *Kennan*, pp. 155, 219.

The fact that one has changed his domicil for the sole purpose of escaping burdensome taxation does not in any way militate against the good faith of a change which is otherwise complete; *Kennan*, p. 219.

The disavowal of any liability for taxation and the refusal to pay taxes is given weight on the question of intention respecting domicil; *Kennan*, pp. 97, 155.

Every person who is *sui juris* has the inalienable right to change or retain a domicil even though the motive which may prompt him to do so is questionable, including the object of avoiding excessive taxation; *Kennan*, pp. 322-3.

> "There is no doubt that a change of domicil may lawfully be made for the purpose of avoiding or lessening taxes. If a person actually changes his residence, the motive actuating him is of no consequence." *Commonwealth* v. *Bogigian*, 265 Mass. 531; 164 N. E. 472 at 474.

In *State Ex Rel. Orr* v. *Buder, 271 S. W. 508, (Mo.) 39 A. L. R. 1199*, at p. 1207, the court said:

> "In every case cited by respondent and the *amici curiae*, taxable property was manipulated in a way to avoid taxation. Here there was no concealment. There is no fraud in doing a lawful act. A man may change his residence to avoid taxation. He may change the form of his property by putting his money in nontaxable securities, or in the form of property which would be taxed less, and is not guilty of fraud. * * * One cannot be guilty of

> fraud by doing what he had a legal right to do. A court does not inquire into one's motives for doing a lawful act" (citing cases).

The records of the tax collector of Cinnaminson Township, Burlington County, New Jersey, for the years 1924 to 1930, show payments by decedent in that township each year for personal property, poll and other local taxes (*R. 479*).

The Assessor of Radnor Township, Pennsylvania, after decedent had purchased the Radnor house, sent to decedent, in the fall of 1925, the usual form of return for the Pennsylvania Four Mill Tax on personal property. Copies of that form for the years 1925 and 1926 were offered in evidence (*R. 484*). The instructions thereon state that the Four Mill Tax is due from every person above 21 years of age who is a resident or domiciled in the State of Pennsylvania. Domicil is therein defined as the place where the person permanently resides: They state:

> "Absence for months or years will not change it so long as there is an intention of returning, and it cannot be lost until another has been acquired. * * * A temporary residence in this state (Pennsylvania) renders taxable only so much of his personal property as he has actually within the state."

When decedent received that tax form he, after consulting Judge Lippincott, wrote a letter on February 3, 1926, to the assessor of Radnor Township returning the form, with his affidavit endorsed thereon that he was a resident and voter of Cinnaminson Township, Burlington County, New Jersey, and intended to continue to vote and reside therein, and that decedent was advised that under these circumstances, not being a resident of Pennsylvania, he was not subject to personal property tax therein (*R. 457-8*).

Taxes were naturally in the mind of decedent (as in everybody else's mind), as is indicated not only by the

extensive provisions in his will regarding inheritance taxes, but also by his correspondence and conversations at different times.

Decedent discussed with Judge Lippincott, the Pennsylvania property tax laws and the New Jersey inheritance tax laws, but never mentioned the Pennsylvania inheritance tax laws; a matter of such magnitude and importance to his estate that decedent would not have overlooked it, if he had any idea that he was subject to any assessment there.

State Office.

The acceptance of public office is usually considered as persuasive evidence of residence in that place, especially when the oath required to be taken recites that he is a resident, or where the office in question is one which could not legally be held by a non-resident; *Kennan, p. 139.*

On October 29, 1925 (less than a month before the occupancy of the Radnor house), the Governor of New Jersey appointed decedent "of Cinnaminson" a member of a commission of the State of New Jersey, created by the Legislature to investigate the question of compensation for personal injuries, etc. (*R. 481*).

Political Activities.

Decedent's political activities appear from the correspondence recited under the subheading "written declarations."

(See *Phillim. pp. 131-40.*)

10. Possession of Real Estate.

Decedent left no real estate.

The Cinnaminson property was acquired by decedent by deed dated November 20, 1909, and conveyed by him to Joseph Campbell Company by deed dated December 29, 1909 (*R. 479*). At that time decedent was interested in the Campbell Company and, from 1915 until his death, he was the owner of the entire capital stock thereof, and of its successor, Campbell Soup Company.

Title to the Radnor property was acquired in the name of "John T. Dorrance, of Riverton, N. J., and Ethel M. Dorrance, his wife." Upon his death complete title passed to the survivor.

11. Length of Residence and Lapse of Time.

This heading refers to the occupancy of the Radnor house during the winter seasons from November 14, 1925 to decedent's death on September 21, 1930.

The question under this heading is, what influence upon the determination of decedent's domicil during that period, has the length of residence and lapse of time with respect to that occupancy.

Phillimore cites the rule of the civilians that where a person retained the intention of returning to his family domicil, a thousand years would not suffice to establish a new one, *p. 148.*

In *Guier* v. *O'Daniel,* 1 Binn. (Pa.) 349, President Rush held—

> "There is no fixed period of time necessary to create a domicil. It may be acquired after the shortest residence under certain circumstances; and under others the longest residence may be insufficient for that purpose."

See *also Phillim. pp. 141, 146-9.*

Dicey says that residence alone is clearly insufficient to constitute an abandonment of an old domicil and the acquisition of a new one, which he says is apparent with respect to a person living abroad who may retain his old domicil which he may not have seen for years, *p. 84, 127.*

Where a domicil has been established and there is an intention to retain it, absence therefrom, regardless of the lapse of time, does not change the domicil. *Kennan,* pp. 34, 64 and Note 12, 67, 143, 204-5.

The legal presumption favors the established domicil, and the burden of proof rests upon him who asserts that a change has occurred. *Kennan,* pp. 11-12, 197, 220, 236-7.

Radnor House.

Where a person maintains two homes that will be esteemed his domicil which he himself selects, and which appears to be the center of his affairs and where he votes and exercises his rights and duties of citizenship. *Kennan,* pp. 107, 108, 110-11, 111 Note 40, 112, 148.

The Radnor house was purchased by decedent and his wife by deed dated April 22, 1925 (*R. 482*). Additional lands surrounding it were purchased on June 30, 1928 and July 27, 1929 (*R. 482*). The house was first occupied by decedent's family on November 14, 1925 (*R. 373*). At the time it was purchased decedent's brother George asked him whether he was going to move out there. Decedent replied, "No, my home is in New Jersey." Decedent said he was purchasing the Radnor place for his wife and kiddies but he, decedent, wanted to be over in New Jersey and he intended to have his home in New Jersey; that the purchase of the Radnor house would not involve any change in his residence (*R. 298*).

He told his brother that the Radnor house was necessary for his wife and children but that he was better at

Cinnaminson. Dr. George Dorrance testified that neither decedent nor his wife regarded the Radnor house as their legal home or residence (*R. 306*); that it was closed in the summer and the rugs were rolled up and the house was in no condition for occupancy (*R. 310*).

Judge Lippincott testified that he was present at the acquisition of the Radnor property and decedent then asked him whether that purchase would make any difference to his residence in New Jersey. Judge Lippincott advised him that residence was largely a matter of intention and if he retained his Cinnaminson property with the intention of making it his home, the purchase of the Radnor property would not make any difference to his residence in New Jersey (*R. 325-326*). Decedent stated that he intended to keep his home in New Jersey (*R. 342*).

Decedent discussed the purchase of the Radnor property with Mr. Morris, Chairman of the Board of Managers of the Girard Trust Company, of which decedent was a member. He told Mr. Morris he wanted a suitable place for his family for various periods of the year, particularly in winter, because he thought it would be more convenient than Cinnaminson for social engagements in the winter.

Mrs. Dorrance testified that she wanted decedent to buy the Radnor property to enable the children to be more in contact with their schoolmates and with children with their prospects in life, and where they could do some entertaining (*R. 368-9*).

Decedent told her that he would never go to live over there because it was too far from his business. She prevailed upon him to purchase the property on the express stipulation that she would spend a certain amount of the time in the summer at Cinnaminson. They spent the week-ends at the Radnor house when the children were not in school and a good deal at other times, except when they

were in New York or Florida for the winter, or abroad, or were at Cinnaminson.

They stayed at the Radnor house after the children's school commenced and when the social activities began about the first of October (*R. 373-4*). Decedent stayed with his family at Radnor during the week in winter time until the latter part of March or the first of April. Then they went abroad or stayed at Cinnaminson. They went abroad every year from 1922, and sometimes twice a year. The Radnor house was closed every summer, except 1926 (*R. 375-6*), when it was occupied by the servants only (*R. 404-5*). Upon returning from Bar Harbor they went to Cinnaminson and remained there until the children's schools opened.

The Radnor house was used for the coming-out party of their daughter, and her marriage reception on October 1, 1926, also for the marriage of the second daughter in May, 1931 (*R. 413-414*).

Commonwealth's Proof.

All of the evidence and exhibits reviewed under the above several sub-headings were introduced on behalf of the executors before the State Tax Department of New Jersey or at the trial of their appeal from the Pennsylvania appraisement before the Orphans' Court of Delaware County, Pennsylvania. There is no doubt that they diligently endeavored to collect and produce all the evidence that could be found in support of their contention and belief that decedent was domiciled in New Jersey at the time of his death.

The Commonwealth of Pennsylvania offered the testimony of certain witnesses and certain exhibits, which, to the extent that it is incorporated in this record, will now be briefly reviewed.

They presented the application of Mrs. Dorrance (as owner) to the Pennsylvania Department of Revenue for the registration of an automobile for the year 1930. On that application, she gave her address as "Radnor, Del. Co., Pa." (*R. 485*).

They produced the ledger sheets of Bonwit-Teller & Co. showing an account in the name of "Mrs. John T. Dorrance, Radnor, Pa," (*R. 485*). Purchases were delivered to her at Radnor and the bills were sent there because she was there most of the time in the winter, which was the season during which most of her purchases were made. She testified that she thought it would be "ridiculous" to ask that firm to charge the account to Cinnaminson, N. J., and send the purchases to Radnor (*R. 428-9*).

They produced the ledger sheets of Bailey, Banks & Biddle, showing an account opened July 22, 1924, with the address of decedent as 32 N. Front St., Camden, N. J.—Riverton, N. J. The sheets show (without any explanation or instructions) that on March 21, 1925, that address was stricken out and "Woodcrest, Radnor, Pa." substituted. The sheets continued that way until decedent's death, and the account was afterwards continued in the name of Mrs. Dorrance with the same address (*R. 485*). Mrs. Dorrance testified that that account was in her name. She bought very few things there for her children and herself, except at Christmas time, which they usually spent at Radnor, and for that reason the things were sent there (*R. 430-1*).

They produced a letter from decedent dated April 19, 1926, to Strawbridge & Clothier, Philadelphia, stating that decedent had suggested to his wife that she do part of her shopping at that store, and asking them to open an account in the name of Mrs. John T. Dorrance "Woodcrest, Radnor, Pa." The notation on the back of that letter giving the name of Mrs. John T. Dorrance, residence

and business address, and the approval by the credit department, were placed there by that company (*R. 486*). They also produced the bookkeeper's checks of that company showing various articles delivered to decedent's family at Radnor on sixty-eight different occasions (*R. 486*). Regarding this account, Mrs. Dorrance testified that after it had been opened, it was suspended and afterwards re-opened in her name in April 1926. The purchases were delivered at Radnor (*R. 427, 8*).

They produced the ledger sheets of Mitchell-Fletcher & Co. of an account with Dr. J. T. Dorrance from March 1927 to August 1929 with the address "Radnor, Pa." (*R. 488*).

The records of the Telephone Company were produced respecting telephone service at the Radnor house. They showed—"Dorrance, Ethel M. Res. Woodcrest, Radnor."

They produced an application for gas and electric service at the Radnor house, dated May 14, 1925, and signed "Mrs. Ethel M. Dorrance." She referred to the house as "occupied by me as a residence." On the back of the application, there is a notation *by the Gas Company* "former residence New Jersey" (*R. 487*).

They produced excerpts from the Social Register of Philadelphia for the years 1926, 1927 and 1928 giving the address of decedent, his wife, and the members of his family, as "Woodcrest. Radnor, Pa." and for the years 1929, 1930 and 1931, showing their address as "Woodcrest, Radnor, Pa., and Cinnaminson, N. J." (*R. 486*). It appears that the addresses given in the Social Registers of 1926, 1927, and 1928 were inserted contrary to the *express instructions* of decedent in a letter dated December 4, 1925, from him to the publisher wherein he requested them to put in both addresses, as follows "*my home* in Cinnaminson, N. J. and *house* known as 'Wood-

crest,' Radnor, Pa." and subscribing for both places. (Italic ours.) (*R. 481*).

Mrs. Dorrance testified that she gave the Radnor address for members of the family to the Social Register because her eldest daughter was making her debut at that time and wanted an address by which her mail would reach her *during the social season.* Decedent wanted both addresses, Cinnaminson and Radnor, given, but Mrs. Dorrance herself gave the Radnor address *as the winter address* for 1925 and 1926, in order to secure prompt delivery of mail. The Riverton or Cinnaminson address was given as a *summer address.* In 1929, the Social Register finally put in the address and telephone number of the Cinnaminson house because decedent insisted upon it. Although he had requested both addresses in his letter of December 4, 1925, they were not put in, so decedent finally attended to the matter himself but they did not put in both addresses until 1929, when he did subscribe twice. Decedent consented to give his *winter address* as Radnor to enable his children to receive promptly such invitations as was sent to them, and to avoid the delay of their being forwarded from Cinnaminson. Mrs. Dorrance stated that the Social Register did not presume to give residence; but merely gave addresses and telephone numbers.

They produced an enrollment card of John T. Dorrance, Jr. at Montgomery School, Wynnewood, Pa., signed "Ethel M. Dorrance," as parent or guardian, and giving opposite the printed words "home address," Radnor, Pa., and his entry blank in that school dated July 18, 1927, signed "J. T. Dorrance," as parent or guardian, address, Woodcrest, Radnor, Pa., and another entry blank for the same, dated August 13, 1930, signed "J. T. Dorrance," as parent or guardian, address "Woodcrest, Radnor, Pa." (*R. 487*). Mrs. Dorrance testified that she entered her son in the Montgomery School in the autumn of 1925 and that

she probably gave Radnor as the address on the enrollment card *because they were living there in the winter* (*R. 434*).

They produced a family card, dated January 19, 1929, at the Merion Cricket Club, Haverford, Pa., in which decedent requested cards of admittance for that year for his wife and three daughters. Under the printed words on the card "who reside with me at the address stated below" are the words "Woodcrest, Radnor, Pa.," and another card dated January 15, 1930, for that year, signed by the decedent, contained the same information (*R. 487-8*).

Mrs. Dorrance testified that her second daughter entered the School of Industrial Arts of Philadelphia one year while she was abroad, but that she (Mrs. Dorrance) never gave that school the Radnor address. She was connected with the Emergency Aid in Philadelphia, beginning prior to 1925, that she gave her address as Riverton or Cinnaminson and she does not think that she ever changed it. She did however, send checks from Radnor, and if the Emergency Aid ever changed her address, they were not instructed to do so. She has also belonged to the Acorn Club of Philadelphia since 1929. She never gave them any address but assumes that the person who proposed her name must have given her address as Radnor (*R. 435-6*).

Mrs. Dorrance kept a small bank account at Wayne, near Radnor, for the payment of household bills at that place. The address on that account was Radnor; it does not appear that she gave that address to the bank (*R. 436*).

The Commonwealth also offered certain letters; one from decedent at Camden, N. J., dated July 16, 1927 accepting the resignation of Arthur Bibby, addressed to Bibby at Radnor; another from Mrs. Dorrance on February 20, 1928 from hotel at Long Key, Florida, addressed to Martha, a servant, asking her to send some clothes, and addressed to Radnor "c/o J. T. Dorrance"; another

letter from Mrs. Dorrance to Martha from a hotel at Jamestown, dated July 24, 1927, addressed "c/o J. T. Dorrance" at Radnor. Another letter from Mrs. Dorrance, dated April 18, 1928, from Radnor, recommending Martha as a maid (*R. 488-9*).

Comparing the nature and extent of the proof, and the character and standing of the witnesses on either side, the proof of decedent's domicil in New Jersey is overwhelming.

The Pennsylvania Decision.

In his letter of May 2, 1931, to Mr. Kelly of the Inheritance Tax Bureau, Judge Lippincott said that the appeal from the attempted taxation by Pennsylvania is unfortunately to be heard in Pennsylvania courts. Without reflecting in any way upon those courts, I may say that the prize is a rich one for Pennsylvania to secure and that the Pennsylvania authorities will not stop at anything in their efforts to secure an adjudication upholding the assessment (*R. 464*).

Our view is that the opinion of Judge Hannum in the Orphans' Court of Delaware County, and the dissenting opinions of Justices Kephart and Schaffer, (reported in 309 Pa. 151; 163 Atl. 303, 311, 313) are correct expositions of the law of domicil, even in Pennsylvania.

The decision of the Pennsylvania Supreme Court is discussed at length by *Kennan*, p. 759-64; it is sharply criticized by him (*p. 762*). He refers to the principles upon which the Orphans' Court decided the case in favor of the New Jersey domicil, and to the statement of the Pennsylvania Supreme Court that "These principles may be accepted as good law in particular cases" but were not applicable here, and makes the pertinent observation that "precisely why principles which 'may be accepted as good law in particular cases, cease to have

application when applied to the facts of the Dorrance case, does not clearly appear."

He notes that the Supreme Court of the United States has said that "'among the circumstances usually relied upon to establish the *animum manendi* are: declarations of the party; the exercise of political rights; the payment of personal taxes; a house of residence and a place of business,'" and says "certainly these were facts which stood out very clearly in favor of the New Jersey residence."

The facts are summarized in the opinion of the Vice-Ordinary. He says:

> "It is difficult, if not impossible, to conceive of a case in which the items of evidence in this behalf could be more numerous" (*R. 92*).
>
> "It results therefore that he never acquired a legal domicile in Pennsylvania; that he never lost his legal domicile in New Jersey" (*R. 93*).

The Important Decisions.

Among the cases discussed by Kennan (pp. 742-764) are several that closely resemble the present. See *Newcomb's Estate*, 192 N. Y. 238; where decedent had consistently declared her residence to be in New Orleans although she spent only 200 days there and 600 days in New York City, subsequent to her declarations. The court held that she had a right to choose her residence as between New Orleans and New York; *Re Norton*, 96 N. Y. Misc. Rep. 152, 159 N. Y. S. 619; aff. 175 App. Div. 981, 162 N. Y. S. 1133; *Green's Estate*, 99 N. Y. Misc. Rep. 582, 164 N. Y. S. 1063, aff. 179 App. Div. 890, 165 N. Y. S. 1088; *Barbour's Estate*, 185 App. Div. 445; 173 N. Y. S. 276, aff. 226 N. Y. 639, where the New York courts held that William Barbour was domiciled in New Jersey, chiefly on the proof of his filing federal income tax returns in New Jersey; having been a congressional candidate and a member of

the Governor's staff in that state, although he had a winter residence in New York City where he lived with his family.

Out of the multitude of other decisions the following are listed because they are similar in many respects to the present case:

U. S. Supreme Court.

Shelton v. *Tiffin,* 6 Howard 163, 185;
Ennis v. *Smith,* 14 How. 400.
Pennsylvania v. *Ravenel,* 62 U. S. 103;
Mitchell v. *U. S.,* 88 U. S. 350 (1874);
Desmare v. *U. S.,* 93 U. S. 605 (1877);
Chicago & N. W. R. R. Co. v. *Ohle,* 117 U. S. 123 (1885);
Penfield v. *Chesapeake & S. W. R. Co.,* 134 U. S. 351;
Anderson v. *Watt,* 138 U. S. 694 (1890);
Sun P. & P. Assn. v. *Edwards,* 194 U. S. 377;
Williamson v. *Osenton,* 232 U. S. 619;
Jones v. *League,* 59 U. S. 76 (1855);
Morris v. *Gilmer,* 129 U. S. 315;
The Venus, 8 Cranch 251.

New Jersey Cases.

Duke v. *Duke,* 70 N. J. Eq. 135;
Watkinson v. *Watkinson,* 68 N. J. Eq. 632;
In re Russell, 64 N. J. Eq. 313;
Brown v. *Brown,* 112 N. J. Eq. 600.

Pennsylvania Cases.

Guier v. *O'Daniel,* 1 Binn. 349;
In Re: Will of Harbarger, 13 Phila. Rep. 368;
Dalrymple's Estate, 215 Pa. 367;
Carey's Appeal, 75 Pa. 201 (1874).

Cases in Other States

Re Frick's Estate, 116 N. Y. Miscl. 488; 190 N. Y. S. 262;

People v. *Acritelli*, 110 N. Y. Supp. 430;

McCord v. *Rosene*, 39 Wash. 1; 80 Pac. 793;

Estopinal v. *Michel*, 121 La. 879 (46 So. 907);

Pickering v. *Winch* (Reed's Will), 48 Ore. 500, 87 Pac. 763.

Trowbridge Case.

At page 89 of the brief of appellants, is cited the case of *In the Matter of the Estate of James A. Trowbridge*, 266 N. Y. 283. (Also entitled *The State of Connecticut* v. *The State Tax Commission of the State of New York;* also reported in 194 N. E. 756.

The brief states that the case is mentioned "because its facts are almost identical with those of the present case."

The brief then summarizes the evidence in that case on the question of domicil as follows:

> "There the decedent had voted in New York, attended business there almost daily and had investments largely in its bonds and bonds of its municipalities, declared in his will and in innumerable other documents that he was a resident of New York, and in general unquestionably desired to be, and, relying upon the legal advice of his counsel, believed that he was, legally domiciled in New York."

This summary is so incomplete that we deem it appropriate to quote at length from the opinion of the New York Court of Appeals, beginning at page 289 of 266 N. Y., for the purpose of showing the *actual* facts as set forth in the court's opinion, including the comments of the court thereon.

> "Mr. Trowbridge was born at New Haven, Connecticut, June 6, 1843. He was reared and edu-

cated there. In early manhoood he became associated with a banking firm in the City of New York. That association continued until he retired from active business in 1902. In 1884 he acquired a residence property at 57 East Thirty-fourth street in the city of New York which remained in his ownership at his death. This was the principal Trowbridge family establishment, at least until 1890. Thereafter the family spent the summer each year at Noroton, Connecticut, until Mr. Trowbridge in 1904 purchased a substantial residence there which admittedly was his domicile in 1921 when it was razed by fire. It has been held below that Mr. Trowbridge then changed his domicile from Connecticut to the city of New York and kept it there to his death. This finding is the crux of the controversy.

In 1921 Mr. Trowbridge was seventy-eight years of age. His active business life had ended years before. At once he planned to replace the Noroton family headquarters which fire had destroyed. A new habitation on the same site was completed in 1924 at a cost of half a million dollars. By this structure the man sought to express himself. He embellished it with the family crest and coat of arms. The findings are that he 'took a personal pride in having his family circle about him at the house he had built. * * * He had engraved in the stone mantelpiece above the fireplace in the dining room the inscription *'O noctes cenaeque deum quibus ipse meique ante larem proprium vescor'* ('O nights and feasts of the gods which I and mine enjoy before our own hearthstone'). * * * This family home was the center of family reunions on numerous occasions. * * * He had built therein a large play room so that his grandchildren as well as his grandnephews and grandnieces, near neighbors of his * * * would have an appropriate place to play. * * * He was interested in his flowers, his garden and his trees. * * * He took pleasure in running his home, and was distinctly a home man.'

Mr. Trowbridge and his immediate family, his wife and an unmarried son, lived in the new mansion from its completion in 1924 to his death on May 30, 1931. *During that period the house in the city of New York was unused and boarded up. Telephone service there was discontinued.* Furnishings and silver were removed to the Noroton household. In the last six years of his life Mr. Trowbridge spent the night under that roof on all but twenty-one occasions. In 1930 he declared in casual conversation with a friend and neighbor that his home was in Connecticut and that he was going to stay there; *that he had closed his town house and never expected to go back to it.* The learned referee says in his opinion:

'From about November, 1924, decedent and his family lived at the new house at Noroton exclusively.' Such, in substance, is the case made by the State of Connecticut.

After his retirement from active business in 1902, Mr. Trowbridge had desk room in an office at 71 Broadway in the city of New York where he attended almost daily until his death. His investments were largely in bonds of this State and its municipalities. Tax problems persuaded him to have the advice of a lawyer during 1921. He was told 'that it was mainly a matter of intention of the man himself, and that the first thing to do was to describe himself in all writings and instruments as a resident of the State of New York.' Consistently thereafter that counsel was repeatedly followed. The numerous documents in which Mr. Trowbridge characterized himself as residing in the city of New York need not be listed. It is the admitted fact that he desired to have his 'residence' in that city after 1921.

In 1921 and thereafter, except 1925 and 1930, he registered and voted in the city of New York as a resident of 57 East Thirty-fourth street, Manhattan. On October 15, 1921, he filed a verified statement with the Connecticut tax authorities as a nonresident of that State, a declaration of status never withdrawn. Later he requested the tax authori-

ties of the city of New York to transfer his name to the resident tax roll for Manhattan, upon which he was entered accordingly from 1924 to 1930, inclusive, as residing at 57 East Thirty-fourth street. On October 15, 1929, he submitted to the same authority an affidavit asserting that his taxable personal property within this State did not exceed one thousand dollars in value and that his residence was at 57 East Thirty-fourth street. He also said to one of his sons that he was a resident of this State. His will so declares. In substance, such is the proof of the respondent State Tax Commission of this State.

General concepts or definitions of domicile need not now engage us. If at a given time a man exclusively makes his home with his family in a complete domestic establishment, intending so to occupy it for the rest of his days, the place of that habitation is then his domicile, no matter what he may say to the contrary. (*Matter of Roberts*, 8 Paige, 519, 523, 524; *Peterson* v. *Chemical Bank*, 32 N. Y. 21; *Dupuy* v. *Wurtz*, 53 N. Y. 556, 566; *Matter of Harkness*, 183 App. Div. 396.) We have just that case here. Concededly, Mr. Trowbridge actually lived only in his Noroton house for years before his death. His purpose to keep his family settlement there as long as he lived is demonstrated by the accepted evidence. What is there to diminish the force of these dominant facts? Chiefly the declarations made to tax authorities and the periodic voting pilgrimages to the city of New York. These —and again the supporting evidence is undisputed —were all parts of an attempt to vindicate an opinion that a man may retain *an abandoned home* as a technical domicile in law after he has elsewhere established another abode in which he expects to live indefinitely. Doubtless that intention was entertained in good faith and from motives that are beyond criticism; but it is nonetheless irrelevant. (*Chaine* v. *Wilson, 1 Bosw.* 673.) (*See Attorney-General* v. *Yule and Mercantile Bank of India*, (1913) 145 L. T. 9, 17; *Dickinson* v. *Brookline*, 181 Mass. 195, as cited in *National City Bank* v. *Hotch-*

kiss, 231 U. S. 50, 56; *Beale,* 34 Harv. L. Rev. p. 52.) The additional fact that Mr. Trowbridge transacted his limited personal business in this State is unimportant in the circumstances. In *Peterson* v. *Chemical Bank* (*supra*) the question was whether one Cohen at his death had his domicile in the city of New York or in New Haven, Connecticut. In that case, as in this, property and business interests of the decedent were in this State. There it was the fact, as it is here, that the decedent in documents had described himself as of the city, county and State of New York. DENIO, Ch. J., said for this court: 'The evidence was quite conclusive that the domicile of Cohen at the time of his death was at New Haven.' The purchase of an expensive dwelling house for his residence, the measures taken to furnish it with servants, and to repair and supply it with furniture and fuel, and the intention to make it his permanent abode for the remainder of his life *were shown by positive evidence which was wholly uncontradicted.* Upon this evidence there was no question for the jury, and if a verdict had been returned involving a denial of its effect, it would have been at once set aside. If it be conceded that, prior to these acts, and this manifestation of intention, it was equivocal whether his residence was at New York or New Haven, it was no longer so, after he had provided himself with a residence in the latter city, with the absolute determination permanently to occupy it' page 40 of 32 N. Y." (*Italics ours.*)

Some of the significant facts that appear from the foregoing quotation from the opinion are: the decedent was eighty-eight years of age at the time of his death; he had retired from active business 29 years prior to his death; he made his Connecticut residence the "family home," and he and his family, consisting of his wife and an unmarried son, lived in the Connecticut home for seven years immediately prior to his death, during which time the house which he owned in the city of New York was *unused and boarded up,* and during his last six years, de-

cedent spent every night at the Connecticut home except on twenty-one occasions. He had stated that his home was in Connecticut. That he had closed the "town house" and never expected to go back to it.

He maintained a small office in New York City, and occasionally voted there.

The difference in the facts between that case and the present one is obvious.

It is accordingly submitted that the evidence in this record clearly shows that the domicil of decedent was in New Jersey.

This view is forcibly stated at page 41 of executors' brief before this court on their application for writ of certiorari to review the judgment of the Pennsylvania Supreme Court (*Dorrance* v. *Commonwealth*, 287 U. S. 660), as follows:

> "We may state our submission affirmatively by saying that in our view the finding would have been and would be that Dorrance at the time of his death was domiciled in New Jersey if the principles of the common law of domicile as they have been stated by the Supreme Court of the United States had been applied in the instant case. There was a sufficient fact of residence in New Jersey for his domicile to remain there if coupled with an intent to retain New Jersey as his domicile; on the record it is clear that Dorrance's actual and deliberate intention was so to retain his domicile in New Jersey; and the decisions of the Supreme Court of the United States require that such an actual and deliberate intention be given effect."

VIII.

Appellants are estopped from claiming that the domicil of the decedent was in Pennsylvania.

This question was considered in the Prerogative Court. Buchanan, *V. C.*, said:

> "Respondent contends that the appellants are estopped or precluded, for several reasons, from claiming that Dr. Dorrance was not domiciled in New Jersey. It may well be that this contention is sound. Certainly at first impression there would seem to be considerable weight to the argument that the executors, after having claimed by their sworn petition to the Burlington County Surrogate, that Dr. Dorrance was domiciled (resident) in New Jersey; after the adjudication by the Surrogate that he was so domiciled, and the consequent decree probating the will in Burlington County and issuing letters testamentary to these executors (on which letters depends their authority to act in these very proceedings and in the administration of the estate); after they have acted for some two years in administering the estate on the strength of that probate in Burlington County, so procured by them, and have obtained and received from the Burlington County Orphans' Court, allowances of $1,500,000.00 for their services as such executors; after they have, by their original sworn petition to the Tax Commissioner in these proceedings, admitted and asserted that the decedent was domiciled in this State; and after the decedent himself, (the very person whose property is concerned), has asserted in the strongest terms, in the very will which conferred authority on these executors to act as such, that he was domiciled in New Jersey; that the executors should not now be heard or permitted to claim that decedent was not domiciled in New Jersey."
>
> *115 N. J. E. 268 at p. 270 (R. 84).*

Decedent's will revokes the appointment of any executor who fails or refuses to probate his will, within 30 days,

before the Surrogate of Burlington County, or the Ordinary of New Jersey and revokes all interest, income or benefit whatsoever of any person who takes, or on whose behalf is taken, any proceedings to prevent the probate of the will as thus directed (*R. 126-9*).

The accountings made by the executors in the Orphans' Court of Burlington County show the following payments, up to November 25, 1932, out of income to Ethel M. Dorrance, one of the plaintiffs in the executors' suit, aggregating $2,225,951.94, and to Elinor Dorrance Hill, plaintiff in the individual suit, aggregating $230,000.00 (*R. 138-142, 145-151*).

The will provides for regular monthly distribution of the income of the estate (*R. 460*), but what further payments have been received by these plaintiffs is undisclosed because no accountings have been filed pending the New Jersey litigation.

The executors have also received counsel fees aggregating $150,000, and executors' commissions aggregating $1,626,594.26 on those two accountings (*R. 143 and 152*), and additional counsel fees of $250,000 included in the decree of the Prerogative Court.

The petition for probate alleges that decedent died at his residence in Cinnaminson Township, Burlington County, New Jersey. On that petition letters testamentary were issued on October 2, 1930. The executors filed their undertaking to truly perform their duties under the will (*R. 129-132*); and duly filed their inventory and appraisal (*R. 135*); they have ever since proceeded with the administration of the estate, according to the instructions of the will, under the laws and jurisdiction of the courts of New Jersey, where all of the property of the estate is located. They now appear before this court in their capacity of executors under that will.

They submitted their return for transfer inheritance taxes in New Jersey, stating, under oath, that decedent died a resident of Burlington County, supported by copious representations and proof of decedent's domicil in New Jersey to the Comptroller and the State Tax Department of New Jersey (*R. 463-7*); and submitted voluminous proof thereof before the Orphans' Court of Delaware County, Pennsylvania, and made that contention before the Supreme Court of Pennsylvania; and later in this Court on petition for certiorari.

Having all occupied intimate relations with decedent for many years and being familiar with his acts, habits and intentions respecting domicil (which are admitted in their brief pp. 8, 14, 100), and having been constantly advised by competent counsel, they knew better than anyone else the facts and circumstances respecting that subject.

The doctrine of estoppel closes the mouths of the executors and forbids them to claim any benefit under the Pennsylvania judgment.

Assuming that the executors did not know, on October 1, 1930, when they filed their petition for the probate of decedent's will, that the Commonwealth of Pennsylvania claimed an inheritance tax upon his estate on the ground that he was domiciled in Pennsylvania, they did know it at least as early as May 2, 1931 (*R. 463*) when the Register of Wills of Delaware County, Pennsylvania, appointed an appraiser of the estate for that purpose.

Nevertheless, they subsequently filed their inventory and appraisal in Burlington County and have ever since continued to administer and distribute the estate under the jurisdiction and orders of that court and to receive allowances of commissions and counsel fees.

From the probate of the will on October 2, 1930, the executors have proceeded with the administration of the

estate in that court; conscious through all this time of the claim of the Pennsylvania authorities that decedent was domiciled in that state.

If the executors had any doubt (even after notice of the Pennsylvania claim to the contrary) that decedent was domiciled in New Jersey, they could have suspended the proceedings in Burlington County Orphans' Court pending the determination of the Pennsylvania litigation, and thus preserved the estate intact; they elected to stand on their conviction, and the advice of their counsel, that decedent was domiciled in New Jersey, where all of his estate was located; where the provisions of the will were lawful, as they were not under Pennsylvania law; and where other advantages existed by which they and the estate benefited.

Having been unsuccessful in their litigation in Pennsylvania they now seek to undo all that has resulted from the order of probate in this state, although they have accepted, and still retain, the fruits of that choice.

They now ask the court to decide that decedent was not domiciled in New Jersey because they were unsuccessful in another litigation. They cannot change their course and profit by their misfortune in that litigation. They desire to try over again the question of decedent's domicil, a question decided on their own uncontradicted representations and proof before the State tax authorities, before the Surrogate on their sworn application for an order of probate and letters testamentary, before the New Jersey Prerogative Court and the New Jersey Supreme Court.

If the assessment is erroneous for the reasons now stated, it is the result of an error of law, or mistake of judgment, of the executors and their counsel. Such grounds are unavailing. *Apgar* v. *Altoona Glass Co.*, 92 N. J. E. 352; *Perrine* v. *White*, 36 N. J. E. 1; aff'd.

McDowell v. *Perrine*, 36 N. J. E. 632; *Warner* v. *Warner*, 31 N. J. E. 549; *In re Roberson*, 95 N. J. E. 672.

In the *Roberson* case the Court of Errors and Appeals reversed a judgment of the Prerogative Court which opened an earlier decree and held:

> "If the unfamiliarity with the evidence was due to lack of diligence on the part of counsel this was the petitioner's misfortune. The mistake of a judge or jury may be a good cause for a new trial, but not the mistake of counsel. *Warner* v. *Warner*, 31 N. J. Eq. 549. If counsel failed to present the case as fully and forcibly as the petitioner would have liked this was a mistake of judgment on the part of the petitioner in selecting counsel. New trials or hearings are not given for errors or supposed errors of judgment made by a litigant in the selection of counsel. If such were the law there would be no end to litigation" (p. 675).
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> * * * * * * * * *
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> "A client is bound by his own mistakes. He is likewise bound by the mistakes of his counsel" (p. 675).

In re Allison, 106 N. J. E. 55 (decided in 1930) (reargument reported, 107 N. J. E. 197) the Prerogative Court considered an application for an order compelling the executors of the will to probate the same in solemn form. Decedent died in 1925 leaving his widow and three children who were the petitioners in that case. The major portion of the estate was left by a residuary clause in trust for public purposes. The will was proved in common form and the executors qualified as executors and trustees and continued thereafter to act as such and to administer the estate according to the terms of the will.

A few weeks after the will was probated one of the daughters filed a bill in Chancery (in which the widow and the other two children joined by answer and counterclaim) admitting said will to be the last will and testa-

ment of decedent and praying that the residuary clause be held invalid (p. 57).

The Vice-Chancellor, who heard the case, held the residuary clause to be invalid and directed the executors to make distribution of the residuary estate among the widow and children.

That decree was reversed by the Court of Errors and Appeals, and an application to the Supreme Court of the United States for writ of *certiorari* to review that order of reversal was denied (p. 58).

After that litigation had been terminated adversely to the petitioners, they made application to compel the probate of the will in solemn form, alleging lack of testamentary capacity of decedent. The Prerogative Court found that petitioners knew the contents of the will, and the lack, if any, of testamentary capacity of the decedent before the will was offered for probate, and that they could have, at that time, contested its validity on that ground, or for any other reason, if they saw fit to do so (p. 59).

The court held that by admitting the will for the purpose of prosecuting their suit in Chancery they were estopped from later contending that the will was invalid.

The court then reviewed the authorities holding, in substance, that a party cannot take inconsistent positions with reference to the same identical matter or thing, saying (pp. 63-4):

> "Applying the principles, as expressed in the foregoing cases, to the facts and circumstances as they exist in the case at bar, I am satisfied, to say the least, that it would be both inequitable and improper to now permit the petitioners to deny the due making, &c. of this will, especially in view of their solemn admissions to the contrary in the prior chancery suit. *Nor does the fact that said prior suit*

terminated adversely to the petitioners, afford any reason or justification for permitting them to do so. For me to hold otherwise, would be tantamount to relieving the petitioners from the binding effect of their respective admissions, solemnly made in order to induce the court of chancery to assume jurisdiction of and to determine said case, so as to now enable them to contest the very facts which they, by their said admissions, had previously conceded. Thus they, by sanction of this court, would be permitted to play fast and loose with the court of chancery and this court, and they would be permitted to here assume a position entirely different from and inconsistent with that taken by them in the court of chancery with reference to this identical will.

* * * * * * * * *

(p. 64)

"To permit litigants to play fast and loose with the courts, is to strike at the very foundations and bulwark of our entire system of jurisprudence and the due and orderly administration of justice. To permit such would be to subvert the preservation of the public security and repose which requires that an end be brought to all litigation. For me to grant the petitioners' present application would be to ignore these wholesome and well-established principles and to encourage endless litigation. Such a situation, it is needless for me to say, is repulsive and abhorrent to our plainest principles of justice and the due and orderly administration thereof. All the authorities in well-defined and unmistakable language have condemned such a condition."

The *Allison* case bears strong resemblance, in principle, to the present case. Although the subject-matter was different, it clearly establishes the doctrine of estoppel. These executors do not allege that they, or anyone else, were wronged by the assessment (except, now, on account of the Pennsylvania decision). On the contrary they have accepted the fruits, and have acted, *and are now acting,*

under authority of their orders of probate, for several years in the administration and distribution of the estate, and are, therefore, estopped from now claiming adversely.

Many other cases are found in the reports in which the same principle has been applied.

Hill v. *Phelps,* 101 Fed. 650;

Hoffman v. *Norris,* Prerog. Hil. Term (1805), 2 Phillim. Eccl. Rep. 224, note; 40 *Cyc.* 1236, 1893, 1895, 1896;

Van Duyne v. *Van Duyne,* 14 N. J. E. 49;

Stevenson v. *Brown,* 4 N. J. E. 503;

In re Leupp, 108 N. J. E. 49;

Murray v. *Lynch,* 64 N. J. E. 290;

Bender v. *Bateman,* 33 Ohio App. 66; 168 N. E. 574;

In re Cronin's Will, 257 N. Y. Supp. 496;

Fishburn v. *Green,* 291 Ill. 350; 126 N. E. 115;

Meyers v. *Kooke,* 126 Atl. 710 (Md.);

King v. *Rockwell,* 93 N. J. E. 46;

In re Hickman's Estate, 308 Pa. 230; 162 Atl. 168;

Schmidt v. *Johnston,* 140 Atl. 87;

Safe Deposit and Trust Company v. *Hanna,* 150 Atl. 870;

In re Richardson's Will, 30 N. Y. Supp. 1008;

In re Peaslee's Will, 73 Hun. 113; 25 N. Y. Supp. 940;

In re Soule, 3 N. Y. Supp. 259;

Mills v. *Hoffman,* 92 N. Y. 181;

Paxton v. *Brogan,* 12 N. Y. Supp. 563;

In re Ruppaner's Will, 37 N. Y. S. 429; aff. 41 N. Y. S. 212;

Eysaman v. *Nelson,* 140 N. Y. Suppl. 183, 208;

Chipman v. *Montgomery,* 63 N. Y. 221.

One of the executors, Mrs. Dorrance, is estopped from alleging that decedent was domiciled in Pennsylvania by her agreement of January 11, 1926, with decedent

(*R. 466*). All of them are estopped by the express instructions of the will and the benefits they have accepted under its provisions and the orders of the Burlington County Orphans' Court. In the opinion of their counsel, the facts submitted with his letter of May 2, 1931 to the Comptroller of New Jersey "conclusively show decedent's legal residence to be in New Jersey" (*R. 464*). In his advice to decedent about retaining his citizenship in New Jersey at the time of the purchase of the Radnor house, and also with respect to the domicil agreement of January 11, 1926, and the several powers of attorney and other legal documents which were prepared by him as decedent's counsel, and in his testimony, he acted in the strictest sincerity. And the same is true of the executors who testified in the case in Pennsylvania. Undoubtedly they all still believe exactly as they did then, yet their attitude is now changed; not because they believe differently, but because they were unsuccessful in sustaining that belief in the courts of another state where they paid the tax, and now allege that decedent is domiciled in Pennsylvania *for the sole purpose of avoiding the payment of a tax in New Jersey*, and for that purpose they are willing to destroy the will and forfeit their position as executors thereunder; for the contention they now made here is equivalent to a refusal to probate the will in New Jersey in violation of the thirty-third paragraph thereof. It is the duty of every court to protect and support the intention of a testator as expressed in his will. The contention which the executors now make is *ultra vires*. They are decedent's representatives. His will is their law. It is their duty to execute the whole of that will. Their powers are derived exclusively from it and they are legally incapable of doing anything contrary to or beyond the authority therein conferred. *Fenwick* v. *Chapman*, 9 Peters 461; *Bank of U. S.* v. *Beverly*, 1 Howard 134, 150; *Pulliam* v. *Pulliam*, 10 Fed. 23, 45; *Brush* v. *Ware*, 15 Peters 93, 111.

They cannot act otherwise than the will directs or swerve from its instructions.

> "To assume such a power themselves was unjustifiable, and to sanction it would be to say that they may set the will aside, and do what they themselves think expedient or proper. The law gives them no such power, nor ought they to possess it. Neither they nor we can destroy the will." *Covenhoven* v. *Covenhoven*, 1 N. J. L. 243 (210), 245.

It is the duty of the court to enforce the provisions of the will, regardless of what the executors may think or do to the contrary. *Hutton* v. *Hutton*, 41 N. J. E. 267, 271; *Bender* v. *Bateman*, 33 Ohio App. 66, 168 N. E. 574, 575.

That duty is emphasized in this case by the fact that decedent's will is valid under the laws of New Jersey, but is invalid under the laws of the Commonwealth of Pennsylvania.

The following extracts from Bigelow on Estoppel apply:

Chapter XX. Election and Inconsistent Positions Generally. Section 1. Election. p. 732.

> "A party cannot either in the course of litigation or in dealings in pais occupy inconsistent positions. Upon that rule election is founded; 'a man shall not be allowed,' in the language of the Scotch law, 'to approbate and reprobate.' And where a man has an election between several inconsistent courses of action, he will be confined to that which he first adopts; the election, if made with knowledge of the facts, is in itself binding,—it cannot be withdrawn without due consent; it cannot be withdrawn though it has not been acted upon by another by any change of position."
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> * * * * * * * * *
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> (p. 733)
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> "With regard to the facts which require an election the most familiar statement of the doctrine

is found in the law of wills. It is laid down, (rather too broadly, it seems) as an old rule of equity that a person who has taken a beneficial interest under a will is thereby held to have confirmed and ratified every other part of the same, and he will not be permitted to set up any right or claim of his own, however legal and well founded it may otherwise have been, which would defeat or in any way prevent the full operation of the will."

(p. 739) "Thus, one who takes possession of property under a will, and holds and manages it for a long time, and especially if he sell the whole or part of it, will be considered to have made a binding election to accept that property upon the terms of the will."

* * * * * * * * * *

Section 2. Inconsistent Positions Generally (p. 744).

"Under a principle similar to that applied to persons taking under wills, beneficiaries under a trust are estopped, by claiming under it, to attack any of its provisions. The same is to be said, on still stronger grounds, of the trustee; and in general, persons accepting and holding lawful posts of duty are similarly estopped while holding the post, or while retaining the emoluments or benefits of it."

The executors (and, Elinor Dorrance Hill, one of the beneficiaries) under the will are further estopped by reason of the opening of the New Jersey assessment, on the petition of the executors after the amount of the assessment and the taxes thereon have been determined by the Inheritance Tax Bureau of New Jersey.

The assessment was first made October 17, 1931 (*R. 468,*). It was based upon two verified returns made on behalf of the executors and a vast amount of data, documents, proof and statements furnished to the State taxing officers by and on behalf of the executors, and thereafter an express finding of fact of decedent's domicil

in New Jersey was made by the Comptroller. Under the statute an appeal is allowed within 60 days of making the assessment. On December 4, 1931 (*R. 470*), the executors filed with the Tax Commissioner a petition verified by their proctor, reciting the death of decedent, the probate of the will in Burlington County, the filing of their inheritance tax returns in New Jersey, and the assessment of October 17, 1931. They also recited an appraisement by the State of Pennsylvania on the claim of that state that decedent died domiciled therein, and an appeal from that assessment and the trial thereof before the Orphans' Court of Delaware County, where a large amount of testimony was presented respecting the domicil of decedent. They refer to the evidence of domicil which they had previously submitted to the New Jersey taxing authorities and say that subsequently thereto a large amount of additional information, facts and evidence on that subject had been collected which they desire to submit to the New Jersey authorities, for consideration before final action upon the New Jersey assessment. They ask that the assessment of October 17, 1931 be opened, set aside and cancelled, and that the proceedings thereon be opened for the submission of the additional proof (*R. 470-3*).

Acting on the good faith of the executors, and suspecting no change of attitude or intention on their part, the Tax Commissioner granted their petition on December 12, 1931, and opened, set aside and cancelled the assessment to permit them to submit the proposed *additional* proof (*R. 473*).

In acknowledging the letter transmitting that order, their counsel stated that the additional evidence to be submitted would consist of the evidence presented before the Orphans' Court of Delaware County, Pennsylvania, on the appeal from the Pennsylvania appraisement, and that evidence was submitted on March 7, 1932,

together with a copy of the decision and decree of that court setting that appraisement aside and holding that decedent was domiciled in New Jersey (*R. 473-4*).

It later appeared that the real reason for desiring respondent to set aside the assessment of October 17, 1931, was to avoid appealing from that assessment by December 17 of that year, while their contest in Pennsylvania was still pending. There was no dispute about the assessment now under review, with respect to rates, computations or amount, and the only ground upon which they could have rested such an appeal was the contention that decedent *was not* domiciled in New Jersey, which would have been a very embarrassing contention for them to make while they were contending in Pennsylvania that decedent *was* domiciled in New Jersey. The purpose of setting aside the assessment was therefore one of benefit and accommodation to them and their petition did not disclose any doubt or question of decedent's domicil in New Jersey that would put the New Jersey officers on notice that the order to open or set aside the assessment would be used to the advantage of the plaintiffs and to the disadvantage and prejudice of the State of New Jersey.

In September 1932 the executors filed with the Tax Commissioner a copy of the decision of the Supreme Court of Pennsylvania. Thereupon the Tax Commissioner, on October 10, 1932, reinstated the previous assessment and served notice thereof upon the executors (*R. 474-6*).

It was not until October 12, 1932, that their counsel (or any one else) in acknowledging the notices of assessment of October 10, indicated a change of attitude of the executors, by stating that because of the decision of the Supreme Court of Pennsylvania, the executors would appeal from the New Jersey assessment (*R. 476*).

It is claimed on behalf of the State of New Jersey that the doctrine of equitable estoppel prevents appellants from now claiming the advantage of the opening and setting aside of assessment of October 17, 1931, and from now taking the opposite position that decedent was domiciled in Pennsylvania, and from pleading the judgment of the Supreme Court of that state in justification of that change of position, or from making any claim that might prejudice the rights of the State of New Jersey. We claim that the change of condition resulting from the opening of that assessment was brought about by the design and intention of the executors to protect their contention in the Pennsylvania courts, and that they caused the Tax Commissioner to change his position innocently and without his knowledge of their intention, and that they cannot now plead that the New Jersey assessment was made after the Pennsylvania decision and that it is invalid because decedent was held in a later decision to be domiciled in Pennsylvania.

We claim, also, that the action of the Commissioner in opening the assessment, if error on his part, does not bind the State, since his act is unauthorized and *ultra vires*, and did not in any way affect the obligation of the executors to pay the New Jersey tax.

In *Naumkeag Steam Cotton Co.* v. *United States*, 2 Fed. Supp. 126, decided January 9, 1933, the United States Court of Claims held:

(p. 133)

> " 'The estoppel here relied upon is known as an equitable estoppel, or estoppel in pais. The law upon the subject is well settled. The vital principle is that he who by his language or conduct leads another to do what he would not otherwise have done, shall not subject such person to loss or injury by disappointing the expectations upon which he acted. Such a change of position is sternly forbidden. * * * There is no rule more necessary to enforce good

> faith than that which compels a person to abstain from asserting claims which he has induced others to suppose he would not rely on. The rule does not rest on the assumption that he has obtained any personal gain or advantage, but on the fact that he has induced others to act in such a manner that they will be seriously prejudiced if he is allowed to fail in carrying out what he has encouraged them to expect.'"

* * * * * * * * *

There is present in this case an estoppel *in pais*, by acts and conduct of the executors, inducing the Tax Commissioner to change his position, which in this case precludes them from showing even a real fact or truth. They cannot give evidence by affidavits in this case against their former acts and contentions, even though that evidence were true and otherwise admissible. *Bigelow on Estoppel, p. 4; Coke, Litt. 352a; 3 Blackstone Com. 308; Demarest* v. *Hopper*, 22 N. J. L. 599, 619. In the reference to Coke, it is stated that estoppel applies in such a case—

> "Because a man's own act or acts stoppeth or closeth up his mouth to allege or plead the truth."

The doctrine applied to preclude the executors from upsetting what has been determined on their own representations (*Bigelow, pp. 6, 27*), and that rule applies to the executors to estop them from setting up claims adverse to the will under which they act (*Ibid, p. 27*). It is stated—

> "where a person by his words or conduct causes another to believe in the existence of a certain state of things, and induces him to act upon that belief so as to change his position, he will be estopped to aver against the latter a different state of things."

Estoppel arises from silence or concealment of a fact or intention, as well as from an active conduct (*p. 28*) and a party will not be permitted to assume inconsistent positions; and where one has an election between inconsistent courses of action, he will be confined to that course which he first adopts (*p. 30*).

With respect to judgments of another state Bigelow says:

> "even between parties and privies the recital of a judicial record of another state * * * in respect of jurisdiction are but prima facie evidence" (*p. 36*).

The rights of strangers are not affected; strangers can neither be bound by nor take advantage of the recitals of the record (*p. 35*).

(*p. 603*).

> "Estoppel by representation consists in holding for truth a representation acted upon when the person who made it, or his privies, seek to deny its truth and to deprive the party who has acted upon it of the benefit obtained. The origin of the estoppel is probably to be found in the doctrine of equity that if a representation be made to another who deals upon the faith of it, the former must make the representation good if he knew or was bound to know it to be false. Lord Eldon in the case just cited speaks of this as 'a very old head of equity.' But the principle had been fully adopted at law as ground for an action of deceit several years before this remark was made, and though still called 'equitable estoppel' the estoppel is as fully available at law as in equity.
>
> In order to justify the interposition of equity in the case mentioned it is necessary to establish, not only the fact of misrepresentation or concealment, but also that it has been in a matter of substance or of importance to the interests of the other party, and that it has actually misled him."

If the assessments of October 17, 1931, had not been set aside at the request of the executors, the time for appeal would have expired in 60 days. It is certain, on the face of the executors' representations, that an appeal would not have been taken. If taken, it is inconceivable that, on the record then before the Tax Department, the assessment would not have been sustained.

But, in any event, the appeal would have been decided and the matter disposed of before the Pennsylvania decision of a year later, was rendered.

We do not admit that appellants' present claims are effective to defeat the New Jersey assessment, but if they have merit, they are estopped from asserting them now.

IX.

Interlocutory injunction should not be issued if the questions either of fact or of law are doubtful.

If the questions either of fact or of law are doubtful, interlocutory injunction should be denied.

In *Fleetway, Inc.* v. *Public Service Interstate Transportation Co.*, 4 Fed. Supp. 482, Avis, *D. J.* said:

> "A preliminary injunction should not be granted by a court of equity, unless the right to the relief is clear; and I am constrained to say that I am not satisfied that the facts and law are sufficiently clear to justify me in the issuance of such relief in the instant case.
>
> In addition, I have considerable doubt as to the right of the plaintiff to relief, based upon the general equity principle of the acts and attitude of plaintiff" (p. 484).

In *United States* v. *Republic Oil Refining Company*, 8 Fed. Supp. 897, Forman, *D. J.*, said:

> "Relief by injunction is drastic and will only be granted in extraordinary cases. Curtis Publishing Co. *v.* Federal Trade Commission, 270 F. 881, 914 (C. C. A. 3), Williamson Candy Co. *v.* Ucanco, 297 F. 454 (C. C. A. 8).
>
> The principle is firmly established that whether a preliminary injunction shall be awarded rests in the sound discretion of the trial court. Meccano, Ltd. *v.* John Wanamaker, 253 U. S. 136, 40 S. Ct. 463, 64 L. Ed. 822; Buffington *v.* Harvey, 95 U. S. 99, 24 L. Ed. 381. This discretion must be exer-

cised according to the established law and rules of equity. Behre *v.* Anchor Insurance Co., 297 F. 986 (C. C. A. 2); Kryptok Co. *v.* Stead Lens Co., 190 F. 767, 39 L. R. A. (N. S.) 1 (C. C. A. 8).

It is established that the court will balance the conflicting equities of the parties, and, if it appears probable that the complainant will establish his right on a final hearing, the court will for the time being preserve his apparent right provided that can be accomplished without subjecting the defendant to the danger of greater harm than the complainant will be benefited by the relief. City of Louisville *v.* Louisville Home Telephone Co., 279 F. 949 (C. C. A. 6); Pyle *v.* Texas Transport & Terminal Co. (D. C.) 185 F. 309. But a preliminary injunction will not be granted in a doubtful case; particularly where great damage will not result to the applicant. The right should plainly appear as well as the pressing necessity for the relief. This is true in a case where the proofs leave the court in serious doubt in regard to the right asserted by the complainant (Brooklyn Baseball Club *v.* McGuire (C. C.) 116 F. 782; Sperry & Hutchinson Co. *v.* Pommer (D. C.) 199 F. 309), or where the facts are in serious dispute (Hall Signal Co. *v.* General Railway Signal Co., 153 F. 907 (C. C. A. 2), Southern Counties Gas Co. *v.* City of Long Beach (D. C.) 295 F. 530). If upon examination of the pleadings and affidavits it appears that the complainant has a questionable case, the preliminary injunction ought to be denied and restraining order vacated. Anargyros & Co. *v.* Anargyros (C. C. A.) 167 F. 753." (p. 904).

In any event, interlocutory injunction should issue only in a case where it appears without substantial dispute that without such injunction the plaintiff will suffer irreparable injury, *32 C. J. 36; Kellett* v. *Local No. 274,* 114 N. J. E. 107.

If substantial doubt exists as to the wisdom of a preliminary injunction, that fact is enough to require the court, in its discretion, to withhold it.

The rule that an injunction (either interlocutory or final) should not issue in a doubtful case, is especially applicable to tax cases that involve the collection of public revenue. In that kind of cases it has been repeatedly pointed out that the collection of the public revenue is a matter of such great importance to the state that the courts will interfere with such collection by injunction *only when the right to such relief is clear.*

In *Boise Artesian Co.* v. *Boise City*, 213 U. S. 276, the court said:

> "An examination of the decisions of this court shows that a proper reluctance to interfere by prevention with the fiscal operations of the state governments has caused it to refrain from so doing in all cases where the Federal rights of the persons could otherwise be preserved unimpaired" (*p. 282*).

In *Matthews* v. *Rodgers*, 284 U. S. 521, the court said:

> " 'Section 16 of the Judiciary Act of 1789, 1 Stat. 82, perpetuated without material change as Rev. Stat. sec. 723, Jud. Code sec. 267 (28 U. S. C. sec. 384), declares that suits in equity shall not be sustained in the courts of the United States "in any case where plain, adequate and complete remedy may be had at law." The effect of this section, which was but declaratory of the rule in equity, established long before its adoption, is to emphasize the rule and to forbid in terms recourse to the extraordinary remedies of equity where the right asserted may be fully protected at law. See Deweese *v.* Reinhard, 165 U. S. 386, 389, 17 S. Ct. 340, 41 L. Ed. 757; New York Guaranty Co. *v.* Memphis Water Co., 107 U. S. 205, 214, 2 S. Ct. 279, 27 L. Ed. 484.
>
> 'The reason for this guiding principle is of peculiar force in cases where the suit, like the present one, is brought to enjoin the collection of a state tax in courts of a different, though paramount sovereignty. The scrupulous regard for the rightful independence of state governments which should at all times actuate the federal courts, and

a proper reluctance to interfere by injunction with their fiscal operations, require that such relief should be denied in every case where the asserted federal right may be preserved without it. * * * If the remedy at law is plain, adequate, and complete, the aggrieved party is left to that remedy in the state courts, from which the cause may be brought to this Court for review if any federal question be involved, Jud. Code sec. 237 (U. S. C. A. Title 28, sec. 344), or to his suit at law in the federal courts if the essential elements of federal jurisdiction are present.' " (citing cases.) (*p. 525*).

The annotations at the foot of that decision, as reported in 76 L. ed., p. 455, contain many more cases in point; the annotator summarizes the rule as follows:

"In the Federal and in some of the state courts the rule is followed that the unconstitutionality of a tax is not in itself sufficient ground for the issuance of an injunction against enforcement procedure; but that to warrant injunctive relief additional circumstances must appear bringing the case within some recognized head of equity jurisdiction, such as the prevention of a multiplicity of suits or actions."

In *Hawks* v. *Hamill*, 288 U. S. 52, the court said:

"There is another path of approach that brings us to the same goal, an approach along the line of the law of equitable remedies. Caution and reluctance there must be in any case where there is the threat of opposition, in respect of local controversies, between state and federal courts. Caution and reluctance there must be in special measure where relief, if granted, is an interference by the process of injunction with the activities of state officers discharging in good faith their supposed official duties. In such circumstances this court has said that an injunction ought not to issue 'unless in a case reasonably free from doubt.' " (citing cases.)

"The rule has been characterized as an 'important' one, to be 'very strictly observed' " (citing

cases). "It is such interference by the process of injunction with the activities of state officers that the respondents now seek. The members of the State Highway Commission believe it to be their official duty to take possession of the bridge, and propose to act accordingly. The Attorney General of the state is about to institute proceedings at law and in equity to vindicate the public rights or what he believes to be such rights. The County Attorneys of the McClain and Cleveland Counties propose to sue for fines and penalties. All these activities the respondents ask us to enjoin. Indeed all have been enjoined by the decree under review. Only a case of manifest oppression will justify a federal court in laying such a check upon administrative officers acting *colore officii* in a conscientious endeavor to fulfill their duty to the state. A prudent self-restraint is called for at such times if state and national functions are to be maintained in stable equilibrium. Reluctance there has been to use the process of federal courts in restraint of state officials though the rights asserted by the complainants are strictly federal in origin" (*p. 60*).

The reluctance of Federal Courts to interfere by injunction with the action of state officers in the collection of taxes, is further illustrated by the case of *Chicago Great Western R. Co.* v. *Kendall*, 266 U. S. 94, 98, 99, where the court said (italics ours):

"The averments of both bills make a case of unjust discrimination against complainants' property in that there is an intentional systematic under-valuation by state officials of Iowa of other taxable property of the same class, when the complainants' property is assessed and taxed at a much higher rate. In such cases, the Federal authorities render it clear that the complainants may have the remedy by injunction in equity to prevent the taxation of their property at any higher rate than that imposed upon the property of those in whose favor the discrimination exists.

> (Citing cases.) It is not enough, in these cases, that the taxing officials have merely made a mistake. It is not enough that the court, if its judgment were properly invoked, would reach a different conclusion as to the taxes imposed. *There must be clear and affirmative showing* that the difference is an intentional discrimination, and one adopted as a practice."

Again, same case at p. 100:

> "It would take a very clear case upon the record to justify this court in setting aside the conclusion of a court of three judges under section 266 upon what is solely a question of fact and an exercise of sound judicial discretion as to the just balance of convenience in granting or withholding a temporary suspension of the operation of a state law in the collection of taxes. *This court must respect in the fullest degree the sensitiveness of Congress in hedging about the sovereign power of taxation by the states, and precluding temporary Federal judicial interference with it save in clear cases.*"

In the present suits the bills allege, and their brief states (*p. 18*), that if the appellants pay the tax it will be the duty of the Tax Commissioner to pay the same to the treasurer of the State, and that it will be the duty of the latter to apply $10,000,000. of the amount of the tax to the redemption of bonds issued under authority of *Chapter 255, New Jersey Laws of 1934.*

The latter allegations and statements are not correct. Under said statute the money received by virtue of the collection of this tax is only one of several sources wherewith the State of New Jersey has provided funds to meet the principal and interest of the bonds issued pursuant thereto.

These bonds were issued for the relief of the unemployed and dependents in the State of New Jersey.

The fact that one of the means provided by the Legislature for the payment of principal and interest thereof is the very tax that is now in litigation, is a significant circumstance to be considered by the court in deciding whether an interlocutory injunction should issue; the provisions of that statute emphasize the importance of giving pause to any suggested interference with the collection of state revenues in the normal course of the enforcement of state statutes.

To summarize:

We submit that both on questions of law and on questions of fact, the right of the appellants to an interlocutory injunction is, to say the least, extremely doubtful; relief of this character should be granted only in extraordinary and clear cases.

The existence of a substantial doubt, either of law or of fact, requires the denial of the writ—particularly in cases that involve the collection of the public revenues.

CONCLUSION.

While the court below rested its decree chiefly upon its decision that Section 265 of the Judicial Code forbade the issuance of injunctions in the present cases, those decrees are equally sustainable on any other valid ground, even though not assigned in the court's decision. For this reason, while we have discussed as Point I the ground assigned in the decision of the court below, we have added Points II to IX, inclusive, as additional grounds upon which those decrees are sustainable—even if this court should not agree with the court below on the ground assigned in its decision.

The decrees of the court below, denying the prayer for interlocutory injunction, should be affirmed.

Respectfully submitted,

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November 11, 1935.

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Supreme Court of the United States

OCTOBER TERM, 1935.

ELINOR DORRANCE HILL, *Appellant,* *vs.* J. H. THAYER MARTIN, *et als.,* *Appellees.*	*No. 193.*
ETHEL M. DORRANCE, *et als.,* *Appellants,* *vs.* Same, *Defendants.*	*No. 194.*

Supplement to Brief on Behalf of Appellees.

At the request of the court on the argument of these cases (Nov. 11, 1935) appellees submit the following citations of decisions of the New Jersey Court of Errors and Appeals on its power to review questions of fact on appeal from the New Jersey Supreme Court:

1. Cases declaring that power:
   Jordan v. *Borough of Dumont,* (1928) 105 N. J. Law 197, 198 (citing 7 previous decisions);
   Harman v. *Reed,* (1931) 108 N. J. Law 191, 194.

2. Case exercising that power:
Central R. R. Co. of N. J. v. *State Tax Dept.* (a tax case), 112 N. J. Law 5.

Respectfully submitted,

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November 13, 1935.